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

CITY OF WESTON, FLORIDA, et al.,

Plaintiffs,

v.

THE HONORABLE RICHARD "RICK" SCOTT, et al.,

Defendants.
_____/

Leon County Case No. 2018 CA 000699 (Applicable to All Actions)

DAN DALEY, in his official capacity as Commissioner of the City of Coral Springs, Florida, et al.,

Plaintiffs,

v.

STATE OF FLORIDA, et al.,

Defendants.
_____/

Broward County Case No. 2018 CA 008664 (Applicable to All Actions)

BROWARD COUNTY, a political subdivision of the State of Florida, et al.,

Plaintiffs,

v.

THE STATE OF FLORIDA, et al.,

Defendants.
_____/

Leon County Case No. 2018 CA 000882 (Applicable to All Actions)

DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

With certain exceptions, Florida law reserves "the whole field of regulation of firearms and ammunition" to the Florida State Legislature and preempts all other regulation in that field. § 790.33(1), Fla. Stat. Plaintiffs in the three above-captioned cases—*City of Weston v. Scott*, 2018-CA-000699 (Leon Cty. Cir. Ct.) ("*Weston* Plaintiffs"), *Daley v. State*, 2018-CA-008664 (Broward Cty. Cir. Ct.) ("*Daley* Plaintiffs"), and *Broward County v. Scott*, 2018-CA-000882 (Leon Cty. Cir. Ct.) ("*County* Plaintiffs")—challenge the constitutionality of a provision that enables "adversely affected" individuals and organizations to enforce the State's preemption provision through a private right of action and civil penalties available against officials who violate the provision "knowingly and willfully." *See id.* § 790.33(3)(f). The *County* Plaintiffs also challenge Section 790.335(4)(c), Florida Statutes, which charges the Attorney General with authority to enforce the State's prohibition of registries and lists of lawfully owned firearms and their owners.

Plaintiffs have named a panoply of defendants, including the State of Florida, the Florida Attorney General, the Florida Commissioner of Agriculture, the Florida Chief Financial Officer, the Commissioner of the Florida Department of Law

Enforcement ("FDLE Commissioner"), the Florida Auditor General, and the Broward County State Attorney and Sheriff (collectively, "Defendants").[1]

Defendants move to dismiss these actions because they do not present a justiciable case or controversy.[2]

BACKGROUND

The Florida Constitution grants the State Legislature plenary authority to preempt local regulation in any field not expressly reserved to local authorities. *See* Fla. Const. Art. VIII, §§ 1(f), (1)(g), 2(b); *see also Weaver v. Heidtman*, 245 So. 2d 295, 296 (Fla. 1st DCA 1971) ("The respective counties of this State do not possess any indicia of sovereignty; they are creatures of the legislature, created under Art. VIII, § 1, of the State Constitution, and accordingly are subject to the legislative prerogatives in the conduct of their affairs"). As the Florida Supreme Court has explained, if the rule were otherwise, the State's "political subdivisions would have the power to frustrate the ability of the Legislature to set policies for the state." *Metro. Dade Cty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 504 (Fla. 1999).

[1] Governor Rick Scott and the Broward County Clerk of Courts are also named as defendants in these actions and have separate legal counsel.

[2] On June 4, 2018, the Seventeenth Judicial Circuit in and for Broward County ordered the *Daley* action transferred to the Second Judicial Circuit. That transfer has not yet been completed. On July 2, 2018, the parties to these three actions submitted a joint motion for consolidation. That motion is pending. Except where specifically stated, this motion applies to all three actions.

As Plaintiffs note, "the State has preempted several subject areas, including, *inter alia*, signs for gas stations and franchises, the activities and operations of pest control services, the operation of the state lottery, the use of electronic communication devices in motor vehicles, inter-district transfers of groundwater, mobile home lot rents, minimum wage, short-term rentals, plastic bags, and managed honeybee colonies." *Weston* Am. Compl. ¶ 26. It should therefore come as no surprise that the Legislature would also reserve for itself the regulation of firearms and ammunition, a crucially important area of law uniquely poised at the intersection of public safety and citizens' constitutional rights. In 1987, the Legislature did just that, enacting the Joe Carlucci Uniform Firearms Act ("the Act"), which preempts, with certain exceptions, "the whole field of regulation of firearms and ammunition." § 790.33(1), Fla. Stat. Florida is now one of at least 43 states that substantially limits the local regulation of firearms. *See Preemption of Local Laws*, GIFFORDS LAW CENTER (2017).[3]

The Act's express purpose was "to provide uniform firearms laws in the state." *Id.* § 790.33(2)(a). The provision ensures that Florida general law is both the floor and ceiling in the field of firearms, on the one hand invalidating regulation that is more restrictive than State law and, on the other hand, "requir[ing] local

[3] *Available at* http://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/ preemption-of-local-laws/.

jurisdictions to enforce state firearms laws." *Id.* To further this purpose, the Act applies not only to local regulation but also to "state governmental entities" that act inconsistently with State general law. *Fla. Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966, 972 (Fla. 1st DCA 2013).

Despite the Act, counties and municipalities continued to enact and enforce preempted regulation. This put the onus on citizens to raise the preemption issue in court, and led to costly litigation, waste of public resources, and uncertainty as to citizens' rights. For example, "[i]n 2000, the City of South Miami passed [an ordinance that] required locking devices on firearms stored within the city," *Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So. 2d 504, 504 (Fla. 3d DCA 2002), an ordinance very similar to that which the Supreme Court later struck down in *District of Columbia v. Heller*, 554 U.S. 570 (2008). It took citizens two years to get a ruling that the ordinance was preempted and therefore invalid. *See City of S. Miami*, 812 So. 2d at 506.

The Act included no enforcement provision, so there was nothing aggrieved citizens could do other than defend suit or conform their behavior to invalid local ordinances. In response to the *City of South Miami* case and a concern about proliferation of different and irreconcilable local regulation, Fla. Sen. Final Bill Analysis, HB 45, at 2-3 & nn. 13-14 (June 28, 2011), the Legislature amended Section 790.33 by creating a private right of action and civil penalties that may be

sought by persons and organizations "adversely affected" by a preempted local firearms regulation. § 790.33(3)(f), Fla. Stat. Those citizens and organizations may now seek declaratory and injunctive relief, as well as any actual damages (capped at $100,000), legal fees, and costs. *Id.* If the court determines that the defendant's violation of the statute was "knowing and willful," the plaintiff may ask "the court [to] . . . assess a civil fine of up to $5,000 against the elected or appointed local government official . . . under whose jurisdiction the violation occurred." *Id.* § 790.33(3)(c). An official found to have violated the statute "knowingly and willfully" may not be reimbursed with public funds, and he may be removed from office by the Governor. *Id.* § 790.33(3)(d), (e). In a suit seeking declaratory and injunctive relief pursuant to Section 790.33(3)(b), defendants are barred from claiming as a defense that they were acting in good faith or on advice of counsel. Collectively, these penalties put the onus on local officials (rather than citizens) to ensure that local governments comply with Florida general law.

In the wake of the tragic mass shooting in Parkland, Florida earlier this year, the State enacted comprehensive firearms legislation entitled the Marjory Stoneman Douglas High School Public Safety Act. The Attorney General is now defending aspects of that legislation in federal and state court. *See*, *e.g.*, *Nat. Rifle Ass'n of Am., Inc. v. Bondi*, No. 4:17-cv-128 (N.D. Fla.); *Hunt v. State*, No. 2018-CA-000564 (2d Jud. Cir.). Plaintiffs allege that they would have gone further in response to the

tragedy in Parkland. But this case is not about the extent to which firearms and ammunition should be regulated. It is about whether the State can enforce the decades-old decision of its duly elected representatives that the regulation of firearms and ammunition is so important that it must be uniform and therefore must be decided at the State level.

Plaintiffs essentially concede that the State's decision to preempt local regulation of firearms and ammunition was constitutional.[4] Plaintiffs nevertheless claim that the statute's enforcement provisions are unconstitutional. The *County* Plaintiffs also challenge the penalty provision of Section 790.335, Florida Statutes, which charges the Attorney General with authority to enforce the State's prohibition of registries and lists of lawfully owned firearms and their owners.

Defendants move to dismiss these actions because Plaintiffs fail to allege a justiciable case or controversy. *First*, Plaintiffs do not allege that Defendants (or any

[4] *See Weston* Am. Compl. ¶ 26 ("Plaintiffs do not dispute in this action the power of the State, generally, to preempt certain subject matters from regulation by municipalities."); *County* Am. Compl. ¶ 9 ("The Florida Legislature is within its powers to preempt certain fields of regulation. But this action does challenge the constitutionality of the State Firearm Penalties" (emphasis in original)); *Daley* Compl. at 29 (challenging "the Punitive Provisions" but not "the Preemption Provision"). Some of the Plaintiffs seem to challenge the preemption provision to the extent they claim that its interaction with the penalty provisions renders both provisions unconstitutionally vague. *See Weston* Am. Compl. ¶¶ 92-101. And the *County* Plaintiffs seek a declaratory judgment concerning the scope of the preemption provision, including whether it covers certain proposed regulations. In furtherance of those claims, the *County* Plaintiffs seem to challenge certain interpretations of the preemption provision. *See County* Am. Compl. at 44-45.

other state officials) have threatened to enforce the challenged provisions against them (or anyone else), so their concerns are entirely speculative. The injuries alleged by the *Weston* Plaintiffs and certain of the *County* Plaintiffs (namely the Miami-Dade County Plaintiffs) are also speculative because those plaintiffs do not allege that, but-for the challenged provisions, they would enact or enforce regulations arguably within the provisions' scope. *Second*, Plaintiffs name as defendants state officials who lack the requisite connection to the challenged provisions and therefore cannot be required to defend suit. *Third*, Plaintiffs lack standing because local governments and their officials are barred from challenging legislation affecting their duties. *Finally*, even if Plaintiffs otherwise have standing, they lack standing to challenge paragraphs (3)(c)-(e) of Section 790.33 because they fail to allege a legally cognizable injury caused by those provisions.

ARGUMENT

I. There Is No Justiciable Case Or Controversy Because None Of The Defendants Named In These Actions Has Threatened Enforcement Action Against Plaintiffs.

It is black letter law that plaintiffs fail to allege a justiciable case or controversy when they assert only "speculative fear of harm that may possibly occur at some time in the indefinite future." *State v. Fla. Consumer Action Network*, 830 So. 2d 148, 152 (Fla. 1st DCA 2002). This is particularly true where, as here, Plaintiffs challenge the constitutionality of a state statute. "Fundamental

constitutional principles dictate that one may not challenge those portions of an enactment which do not adversely affect his personal or property rights." *State v. Benitez*, 395 So. 2d 514, 517 (Fla. 1981) (citation and internal quotation marks omitted). "Such a personal stake in the outcome of the controversy is necessary to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Id.* (citation and internal quotation marks omitted). This is no less true in a declaratory judgment action. *See Martinez v. Scanlan*, 582 So. 2d 1167, 1170-71 (Fla. 1991) ("Even though the legislature has expressed its intent that the declaratory judgment act should be broadly construed, there still must exist some justiciable controversy between adverse parties that needs to be resolved for a court to exercise its jurisdiction. Otherwise, any opinion on a statute's validity would be advisory only and improperly considered in a declaratory action.").

In keeping with these principles, the Florida Supreme Court and District Courts of Appeal have repeatedly held that "[a] party seeking an adjudication of the constitutionality of a statute and/or a declaratory judgment must show that he or she has been charged with violating the statute or is *actually threatened* with prosecution for its violation and that the declaration requested will affect his or her rights." *McGee v. Martinez*, 555 So. 2d 914, 915 (Fla. 1st DCA 1990) (emphasis added), *review denied* 564 So. 2d 1086 (Fla. 1990); *see Tribune Co. v. Huffstetler*, 489 So.

2d 722, 724 (Fla. 1986) (holding that the constitutionality of a statute "should be determined either in a proceeding wherein one is charged under the statute or in an action alleging an imminent threat of such prosecution"); *El Faison Dorado, Inc. v. Hillsborough Cty.*, 483 So. 2d 518, 519-20 (Fla. 2d DCA 1986) (affirming dismissal for lack of a justiciable controversy because there was no evidence the plaintiff "ha[d] ever been threatened with prosecution under the ordinance in question"); *see also Dep't of Agric. & Consumer Servs. v. Mendez*, 98 So. 3d 604, 609 (Fla. 4th DCA 2012) ("[A]s-applied constitutional challenges, resting on particular facts . . . , are not ripe until the statute has actually been applied."); *Grady v. Bd. of Cosmetology*, 402 So. 2d 438, 440 (Fla. 3d DCA 1981) (holding that challenge to the Board's licensing and testing procedures was not ripe because "the Board has neither tested appellant nor denied him a license").

Plaintiffs do not allege that any of the defendants named in these actions (or any other state official) has "actually threatened" them (or anyone else) with enforcement of the challenged provisions. Instead, Plaintiffs allege only that, because they wish to enact and enforce ordinances that may be preempted by Section 790.33 or prohibited by Section 790.335, they are concerned that they may, at some indeterminate point in the future, be threatened with enforcement by some entity or

individual they do not identify.[5] Accordingly, these actions should be dismissed for lack of a justiciable case or controversy.[6]

Indeed, it is far from clear that even threatened enforcement action by state officials would be sufficient; the First DCA recently suggested that actual enforcement may be required. In *Florida Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452 (Fla. 1st DCA 2017), municipal officials sought a declaratory judgment that the enforcement provisions of Section 790.33 were unconstitutional. *Id.* at 466. The

[5] One Plaintiff, the City of Coral Gables, alleges that a private "gun rights organization" threatened the city with enforcement action in response to a firearm regulation proposed by the city. *Weston* Compl. ¶ 37. The City does not identify that organization, much less name it as a defendant. As discussed below, this allegation serves only to reinforce that Plaintiffs have named improper defendants in these actions.

[6] The actions should be dismissed in their entirety. In addition to their constitutional claims, the *County* Plaintiffs seek a declaratory judgment that certain regulations they wish to enact fall outside the scope of the challenged statutes. *See County* Compl. ¶¶ 135-167. The *County* Plaintiffs cannot and do not allege that any of the named defendants has "actually threatened" enforcement in connection with those regulations. *McGee*, 555 So. 2d at 915. Because they allege only "speculative fear of harm that may possibly occur at some time in the indefinite future," their claims must be dismissed. *Fla. Consumer Action Network*, 830 So. 2d at 152.

The Counties also seek a declaration of "the outermost bounds of permissible regulation that may be enacted by the Counties consistent with applicable law." *County* Compl. at 45. This claim should be dismissed for the additional reason that it seeks a declaration, divorced from any set of facts, explaining the metes and bounds of the statutes in question—a pure advisory opinion outside the Court's jurisdiction. *See Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 721 (Fla. 1994) ("[P]arties must not be requesting an advisory opinion, except in those rare instances in which advisory opinions are authorized by the Constitution." (citation omitted)).

First DCA affirmed this Court's decision that there was no case or controversy because the case did not present "a situation where [municipal officials] were penalized through a fine, denied the use of public funds for their legal defense, or removed from office by the Governor, the[ir claims] would certainly need to be addressed." *Id.*

The injuries alleged by the *Weston* Plaintiffs and certain of the *County* Plaintiffs (namely the Miami-Dade County Plaintiffs) are also speculative because those plaintiffs do not even allege that, but-for the challenged provisions, they would enact or enforce regulations arguably within the provisions' scope. The *Weston* Plaintiffs allege only that they "*desire* to take reasonable, constitutional actions relating to firearms and have *considered* a panoply of possible measures" and that specific measures "have been *discussed* by Plaintiffs." *Weston* Am. Compl. ¶ 36 (emphases added). They allege not that they have voted or resolved to pass such measures, but merely that "[t]he governing body for each of the Municipal Plaintiffs has discussed and affirmatively passed, by majority vote, motions and/or resolutions indicating that the Municipal Plaintiffs would *consider* firearms-related measures if not for the preemption statute and its penalties." *Id.* ¶ 11. Similarly, the Miami-Dade County Plaintiffs allege only that "several Miami-Dade County Elected Officials have demonstrated *interest* in sponsoring legislation that would regulate firearms,"

and that they have approved resolutions "authoriz[ing] this lawsuit" and "urging the Florida Legislature to lift the preemption." *County* Am. Compl. ¶¶ 16-18.

"[I]t is well settled that[] Florida courts will not render, in the form of a declaratory judgment, what amounts to an advisory opinion at the instance of parties who show merely the *possibility* of legal injury on the basis of a hypothetical state of facts which have not arisen and are only contingent, uncertain, [and] rest in the future." *Santa Rosa Cty. v. Div. of Admin. Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995) (citation and internal quotation marks omitted). Accordingly, the *Weston* and Miami-Dade County Plaintiffs must be dismissed.

II. Defendants Should Be Dismissed From These Actions Because They Are Not Proper Parties.

A. Section 790.33

"[I]n order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts," Plaintiffs must allege a "justiciable controversy between adverse parties." *Martinez v. Scanlan,* 582 So. 2d 1167, 1170-71 (Fla. 1991) (quoting *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952)). The defendants named must have "an actual, present, adverse and antagonistic interest in the subject matter" of the lawsuit. *Id.* (quoting *May*, 59 So. 2d at 639). In other words, "it is essential" that the defendant "be the party or parties whose interest will be affected by the decree." *Jacobs & Goodman, P.A. v. McLin, Burnsed, Morrison, Johnson & Robuck, P.A.*, 582 So. 2d 98, 100 (5th DCA 1991); *see also*

North Shore Realty Corp. v. Gallaher, 99 So. 2d 255, 256 (Fla. 3d DCA 1957) ("One who seeks a declaratory judgment is generally not seeking to enforce a claim against the defendant; rather, he is seeking a judicial declaration as to the existence and effect of a relationship between himself and the defendant.").

The requirement of a proper defendant is even more important in the context of constitutional litigation. *See Martinez*, 582 So. 2d at 1171 n.2 (Fla. 1991) (cautioning "trial courts . . . to exercise their discretion guardedly when considering requests for a declaratory judgment on a statute's constitutionality"). The rule not only serves the separation of powers required by the Florida Constitution, but also furthers the preservation and proper allocation of public resources. Each agency named as a defendant must bear the cost of its legal defense, and that cost will be paid from the agency's already limited budget.

Accordingly, the District Courts of Appeal have repeatedly held that "[t]he proper defendant in a lawsuit challenging a statute's constitutionality is the state official designated to enforce the statute." *Atwater v. City of Weston*, 64 So. 3d 701, 703, 705 (Fla. 1st DCA 2011) (reversing and remanding with instructions to dismiss complaint for declaratory and injunctive relief against all defendants); *see also, e.g.*, *Scott v. Francati*, 214 So. 3d 742, 750 (Fla. 1st DCA 2017) (granting writ of prohibition because there were no proper defendants), *review denied* 2017 WL 2991836 (Fla. July 14, 2017); *Treasure Chest Poker, LLC v. Dep't of Bus. & Prof'l*

Regulation, 238 So. 3d 338, 341 (Fla. 2d DCA 2017) (holding that "the Department is not the entity charged with enforcing chapter 849," so plaintiff "has sought relief against the wrong entity"). Indeed, "[a] suit challenging the constitutionality of a statute *must* be brought against the state agency or department charged with enforcing the statute at issue." *Haridopolos v. Alachua Cty.*, 65 So. 3d 577, 578, 579 (Fla. 1st DCA 2011) (emphasis added) (quashing denial of motion to dismiss). "Otherwise," as the Florida Supreme Court has explained, "any opinion on a statute's validity would be advisory only." *Martinez*, 582 So. 2d at 1171. That is because, when the defendant has "no enforcement authority over the statute" at issue, "there is no relief the court could order [the defendant] to provide to remedy the constitutional violation alleged in the complaint." *Scott*, 214 So. 3d at 747. "Private litigants who assert violations of the [statute] may defend the constitutionality of the Act, and they will not be constrained by any [order] that could be issued against the state officials in this action." *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958 (8th Cir. 2015); *see also Okpalobi v. Foster*, 244 F.3d 405, 425-26 (5th Cir. 2001) (en banc) (plurality opinion) (explaining that there was no causation and therefore no standing because the statute, not the defendants, would be the cause of any injury).

None of the Defendants are "designated" to enforce Section 790.33. Section 790.33(3)(a) "clearly sets forth what is prohibited by law, which is the enactment or

enforcement of firearms regulations." *Fla. Carry, Inc.*, 212 So. 3d at 461. As the First DCA has explained, Section 790.33(3)(f) "addresses standing to sue any county, agency, municipality, district or other entity for declaratory and injunctive relief and damages." *Id.* That provision "creat[es] a *private cause of action* for declaratory and injunctive relief as well as actual damages." *Id.* (quoting *Dougan v. Bradshaw*, 198 So. 3d 878, 881 (Fla. 4th DCA 2016) (emphasis added)). Should "the court" find the defendant's violation of the preemption provision was "knowing and willful," plaintiffs may also ask the court to "assess a civil fine of up to $5,000 against the elected or appointed local government official or officials or administrative agency head under whose jurisdiction the violation occurred." § 790.33(3)(c), Fla. Stat. "A knowing or willful violation" may also be "cause for termination . . . by the Governor." *Id.* § 790.33(3)(e).[7]

In sum, Section 790.33 expressly vests enforcement authority in citizens and organizations who are adversely affected by preempted legislation, creating a system of private attorneys general. The statute also appears to charge the Governor with

[7] Plaintiffs also challenge certain procedures that apply in such actions: Section 790.33(3)(b) provides that, in an action seeking injunctive and declaratory relief against a local government, "[i]t is no defense that in enacting the ordinance, regulation, or rule the local government was acting in good faith or upon advice of counsel." And if a defendant is "*found* to have knowingly and willfully violated" the statute, Section 790.33(3)(d) provides that "public funds may not be used to defend or reimburse the unlawful conduct" of the person.

authority to enforce one subsection. The statute charges no other state official with enforcement authority. For this reason, in *Marcus v. State Senate for the State,* 115 So. 3d 448, 448 (Fla. 1st DCA 2013), the First DCA affirmed this Court's decision that the Florida Senate and House of Representatives were "improper defendants" in a challenge to the same statute at issue in this case because neither "has been designated as the enforcing authority of section 790.33" and the challenge did not "involve a duty or responsibility of the State implicating specific responsibilities of" the defendants. *Id.* For the same reason, this Court held that the Attorney General was not a proper defendant, and the plaintiffs did not appeal that ruling. *See Marcus v. Scott*, No. 2012-CA-001260, 2012 WL 5962383, at *3 (Fla. 2d. Cir. Oct. 26, 2012).

The same is true of Defendants here: the State, the Attorney General, Commissioner of Agriculture, Chief Financial Officer, FDLE Commissioner, Auditor General, and the Broward County State Attorney and Sheriff are not "designated as the enforcing authority of section 790.33," *Marcus*, 115 So. 3d at 448. Accordingly, Plaintiffs' claims concerning Section 790.33 must be dismissed as to these Defendants. *See also Digital Recognition Network, Inc.*, 803 F.3d at 958, 962-63 (holding that an action against the Arkansas Attorney General was improper because the challenged statute "provides for enforcement only through private actions for damages," and she "has no comparable role in enforcing the [challenged

provision]; she might join a private litigant in defending the Act's constitutionality, but the private litigant alone seeks to enforce private rights under the statute"); *Shell Oil Co. v. Noel*, 608 F.2d 208, 211 (1st Cir. 1979) ("[I]n an action attacking the constitutionality of a statute . . . an attorney general has not a sufficiently intimate connection with the statute to be a proper defendant if all that is shown is that the statute in question determines the right of one private person to recover from another.").[8]

That Defendants are improperly named in these actions is reinforced by the fact that Plaintiffs do not allege that any of them has ever threatened enforcement action against Plaintiffs or anyone else. To the contrary, Plaintiffs allege only that some of them have been threatened by a private "gun rights organization." *Weston* Am. Compl. ¶ 37. This alone should be dispositive. *See, e.g.*, *Morris v. Livingston*, 739 F.3d 740, 745-46 (5th Cir. 2014) (holding that state officials are proper defendants only if they have a "particular duty to enforce the statute in question and

[8] *Accord McBurney v. Cuccinelli*, 616 F.3d 393, 402 (4th Cir. 2010); *Healthcare Is a Legal Duty, Inc. v. Deters*, 92 F.3d 1412, 1416 (6th Cir. 1996); *Mendez v. Heller*, 530 F.2d 457, 460 (2nd Cir. 1976); *Okpalobi*, 244 F.3d at 425-26; *Children's Bolbol v. Brown*, 120 F. Supp. 3d 1010, 1018 (N.D. Cal. 2015); *June Med. Servs., LLC v. Caldwell*, No. 3:14-cv-525, 2014 WL 4296679, at *3 (M.D. La. Aug. 31, 2014).

a demonstrated willingness to exercise that duty" (internal quotation marks omitted)).[9]

"If the named official is not the enforcing authority," the First DCA has explained, "then courts must consider two additional factors: (1) whether the action involves a broad constitutional duty of the state implicating specific responsibilities of the state official; and (2) whether the state official has an actual, cognizable interest in the challenged action." *Scott*, 214 So. 3d at 746. It is only in the rarest cases that a challenged provision does not charge the defendant with enforcement authority but the defendant nevertheless satisfies this test. Generic authority of the official, for example, is insufficient. *See id.* at 747 ("It is absurd to conclude that the Governor's general executive power under the Florida Constitution is sufficient to make him a proper defendant whenever a party seeks a declaration regarding the constitutionality of a state law."). Rather, the official named as a defendant must

[9] *See also, e.g.*, *Peterson v. Martinez*, 707 F.3d 1197, 1206 (10th Cir. 2013) ("[S]tate officials must have a particular duty to 'enforce' the statute in question and a demonstrated willingness to exercise that duty." (citation and internal quotation marks omitted)); *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 438 (6th Cir. 2000) (holding that, "when the defendant official has neither enforced nor threatened to enforce the statute challenged as unconstitutional," he or she is not a proper defendant); *Deters*, 92 F.3d at 1415; *HealthNow New York, Inc. v. N.Y.*, 739 F. Supp. 2d 286, 295-96 (W.D.N.Y. 2010), *aff'd*, 448 F. App'x 79 (2d Cir. 2011) (granting motion to dismiss because "the remote possibility that the [state official] might decide to act under the [challenged law] without more does not give rise to either an ongoing violation of federal law or an imminent threat of proceedings" for purposes of attaining equitable relief (citation and internal quotation marks omitted)).

have a specific stake in the plaintiff's challenge. *E.g.*, *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 403 (Fla. 1996) (holding that the Governor was a proper party to an action challenging the failure to adequately fund the public education system due to his position as chief executive officer and chairperson of the Florida Board of Education).

These actions involve no "specific responsibilities" or "cognizable interest" of the named defendants. Accordingly, Defendants should be dismissed as improper parties. *See Scott*, 214 So. 3d at 746.[10] For the following reasons, Plaintiffs' allegations concerning each of these Defendants are insufficient:

1. The State of Florida and the Attorney General

As discussed above, the State and the Attorney General are not the "agency or department charged with enforcing the statute at issue," so they are not proper

[10] As noted above, the *County* Plaintiffs seek a declaratory judgment that certain ordinances they would like to enact fall outside the scope of the challenged statutes. *See County* Am. Compl. ¶¶ 135-167. As to those claims, too, Defendants are improper parties. Because they are not "designated to enforce the statute[s]" as to which the *County* Plaintiffs seek construction, *Atwater*, 64 So. 3d at 703, Defendants have no "actual, present, adverse and antagonistic interest in the subject matter" of the claims, *Martinez*, 582 So. 2d at 1170-71 (quoting *May*, 59 So. 2d at 639). Moreover, for the same reasons, a declaratory judgment against Defendants would not redress any injury alleged by the *County* Plaintiffs. *See Scott*, 214 So. 3d at 747; *Digital Recognition Network, Inc.*, 803 F.3d at 958 ("Private litigants who assert violations of the [statute] may defend the constitutionality of the Act, and they will not be constrained by any [order] that could be issued against the state officials in this action.").

defendants. *E.g.*, *Haridopolos*, 65 So. 3d at 578. Plaintiffs seek to establish an exception that would require the State and the Attorney General to defend suit because, "through the Attorney General, the State of Florida can defend the constitutionality of state laws," *Weston* Am. Compl. ¶¶ 15, 20, and "[a]ny defense of the State Firearm Penalties would and should be undertaken by the State of Florida through its Attorney General," *County* Am. Compl. ¶¶ 35, 37; *see also Daley* Am. Compl. ¶¶ 23, 28. But this Court has already ruled that the Attorney General is not a proper defendant in an action challenging Section 790.33 because she "cannot be required to defend suits attacking the constitutionality of a state statute against her will." *Marcus*, 2012 WL 5962383, at *3. And the First DCA has held that a challenge to the constitutionality of a statute is insufficient to render the State a proper defendant. *Fla. Consumer Action Network*, 830 So. 2d at 153-54.

To be sure, the Attorney General is Florida's "chief state legal officer." Art. IV, § 4(b), Fla. Const. In that role, she has the authority to act in the public interest and, when she deems necessary, to intervene in constitutional challenges on behalf of the State itself. But that authority is entirely discretionary. Indeed, "it is the inescapable historic duty of the Attorney General, as the chief state legal officer, to institute, defend or intervene in any litigation or quasijudicial administrative proceeding which *[s]he determines* in *h[er] sound official discretion* involves a legal matter of compelling public interest." *State of Fla. ex rel. Shevin v. Exxon Corp.*,

526 F.2d 266, 271 (5th Cir. 1976) (emphasis added and quotation marks omitted); *see also, e.g., State ex rel. Landis v. S. H. Kress & Co.*, 155 So. 823, 826 (Fla. 1934) ("[T]he office of [Florida] attorney general is in many respects judicial in character and [she] is clothed with a considerable discretion[.]"), *superseded by statute on other grounds as stated in State ex rel. Watson v. Dade Cty. Roofing Co.*, 22 So. 2d 793, 794 (Fla. 1945). That discretion is unreviewable. *See State ex rel. Landis*, 155 So. at 828.

The Florida Legislature and Supreme Court have codified the Attorney General's inherent discretion in both the Florida Statutes and the Florida Rules of Civil Procedure, which require notice to the Attorney General when a party to litigation calls into question the constitutionality of a state statute. *See* § 86.091, Fla. Stat.; Fla. R. Civ. P. 1.071. The purpose of this "'was to provide an avenue for the interests of the State to be represented contingent . . . upon the Attorney General's concluding that the State's interests should be represented in such proceedings' . . . ." *Martin Memorial Med. Ctr. v. Tenet Healthsystem Hosps. Inc.*, 875 So. 2d 797, 800 (Fla. 1st DCA 2004) (quoting *Watson v. Claughton*, 34 So. 2d 243, 246 (Fla. 1948)). "While this grants the Attorney General the discretion to participate and be heard in a particular case, [it] neither compels such participation nor joins the Attorney General as a party." *State v. Fla. Workers' Advocates*, 167 So. 3d 500, 504 (Fla. 3d DCA 2015).

The First DCA has held that "it is obvious that the statutory authorization does not create the adverse or antagonistic interest necessary for the exercise of the court's declaratory-relief jurisdiction," *Fla. Consumer Action Network*, 830 So. 2d at 153, and the Florida Supreme Court has explained that the statute and rule were merely intended to be "consistent with" the preexisting doctrine that the Attorney General "has the discretion to participate and be heard on matters affecting the constitutionality of a statute," *In re Amendments to The Fla. Rules of Civil Procedure*, 52 So. 3d 579, 582 (Fla. 2010). Thus, neither the statutory authorization nor the inherent discretion codified in that statute, without more, renders the Attorney General or the State a proper defendant.

Moreover, the Florida Supreme Court has repeatedly held that neither the State nor the Attorney General is "necessary" "to any determination of the constitutionality of any state statute." *State ex rel. Shevin v. Kerwin*, 279 So. 2d 836, 837-38 (Fla. 1973); *see Mayo v. Nat'l Truck Brokers, Inc.*, 220 So. 2d 11, 13 (Fla. 1969); *Martin Memorial Med. Ctr.*, 875 So.2d at 800 (holding that the Attorney General was not a necessary or indispensable party to a constitutional challenge). Because the Florida Supreme Court also requires in a declaratory judgment action that the parties with the requisite "antagonistic and adverse interest are *all* before the

court," *Martinez*, 582 So. 2d at 1170 (quotation marks omitted), it follows that the State and the Attorney General lack such an interest.[11]

While the Attorney General may well be a proper defendant in a challenge to a statute that expressly vests her with enforcement authority, the Court would eviscerate the Attorney General's discretion by holding, as Plaintiffs allege, that she may be required to stand suit each time plaintiffs challenge a statute to which she bears no special relationship. *See Weston* Am. Compl. ¶¶ 15, 20; *County* Am. Compl. ¶¶ 35, 37; *Daley* Am. Compl. ¶¶ 23, 28. Moreover, the public fisc would be at the mercy of private plaintiffs, as "it would be futile for the Attorney General to defend each statute against all constitutional challenges at the trial level." *Kerwin*, 279 So. 2d at 838; *see also Digital Recognition Network, Inc.*, 803 F.3d at 958, 962-63 (holding that an action against the Arkansas Attorney General was improper because the challenged statute "provides for enforcement only through private

[11] In a legislative redistricting case, the Fourth DCA reversed the denial of the Senate President's motion to intervene. The court said in *dicta* that "[t]he only truly 'indispensable' party to an action attacking the constitutionality of Florida legislation—and this Joint Resolution is in the nature of legislation—is the Attorney General." *Brown v. Butterworth*, 831 So. 2d 683, 689-90 (Fla. 4th DCA 2002). The question of the Attorney General's status as an indispensable party was not before the court, and, in any event, the court's *dicta* are directly contrary to Florida Supreme Court precedent, and have been rejected by the First DCA. *See Martin Memorial Med. Ctr.*, 875 So. 2d at 799-800 (distinguishing and rejecting dicta in *Brown*, 831 So.2d 683, and holding that the Attorney General is not a necessary or indispensable party to a constitutional challenge).

actions for damages," and she "has no comparable role in enforcing the [challenged provision]; she might join a private litigant in defending the Acts' constitutionality, but the private litigant alone seeks to enforce private rights under the statute").

Plaintiffs correctly note that, in an action filed several years ago challenging certain aspects of Section 790.33, the Attorney General exercised her discretion to intervene and defend the statute. *See Fla. Carry, Inc.*, 212 So. 3d at 465; *Weston* Am. Compl. ¶¶ 15, 20; *County* Am. Compl. ¶¶ 35, 37; *Daley* Am. Compl. ¶¶ 23, 28. First of all, as discussed above, the Attorney General has discretion to intervene in any case to defend the constitutionality of a state statute, and that she may choose to do so in one case and not another is entirely her prerogative. Moreover, *Florida Carry* involved different parties and claims than these actions, and the Attorney General intervened for the express purpose of arguing, as she argues here, that there was no case or controversy and that the plaintiffs lacked standing. *See* Ans. Brief of Intervenor, *Fla. Carry, Inc. v. City of Tallahassee*, No. 2014-CA-1168, at 7-15 (Leon Cty. Cir. Ct.). She made those arguments at the summary judgment stage, as the time to file motions to dismiss had expired. Accordingly, the Attorney General briefed the constitutionality of the statute only in the alternative. None of this provides a basis to require the Attorney General to stand suit now, in a different case involving different parties and claims, in which the Attorney General has *not* exercised her discretion to intervene. A ruling to the contrary would raise significant questions of

separation of powers under the Florida Constitution, which the Florida Supreme Court has held should be avoided when at all possible. *See, e.g.*, *Crist v. Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008) ("[S]hould any doubt exist that an act is in violation . . . of any constitutional provision, the presumption is in favor of constitutionality. To overcome the presumption, the invalidity must appear beyond reasonable doubt, for it must be assumed the legislature intended to enact a valid law." (internal citation and quotation marks omitted)).

Finally, Plaintiffs allege that the Attorney General is a proper defendant because her appointee, the Statewide Prosecutor, has "concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws." *Daley* Am. Compl. ¶ 28. Plaintiffs are mistaken. The penalty provisions are civil, not criminal. The statute creates a private right of action for declaratory and injunctive relief and damages, and subjects "knowing and willful" violators to a potential "civil fine" and possible removal from office. § 790.33(3)(c)-(f), Fla. Stat.

For these reasons, the State and the Attorney General should be dismissed as improper defendants.

2. The Commissioner of Agriculture and the FDLE Commissioner

Plaintiffs allege that the Commissioner of Agriculture and FDLE Commissioner, as well as the Attorney General, are proper defendants because each is "expressly designated to enforce and administer a portion of Chapter 790," Florida

Statutes. *See Weston* Am. Compl. ¶ 16 (Department of Agriculture and Consumer Services enforces Section 790.06, Florida Statutes); *County* Am. Compl. ¶ 38 (same); *Daley* Am. Compl. ¶ 29 (FDLE enforces Section 790.65(1)(a), Florida Statutes); *Weston* Am. Compl. ¶ 17 (same); *Weston* Am. Compl. ¶ 15 (Attorney General enforces Sections 790.251(6) and 790.335(5)(c), Florida Statutes); *County* Am. Compl. ¶ 37 (same). But state officials may be not be required to defend the constitutionality of Section 790.33 merely because they are designated to enforce *other, entirely different statutes* that happen to be located in the same Chapter. The First DCA has made clear that "[a] suit challenging the constitutionality of a statute *must* be brought against the state agency or department charged with enforcing the statute *at issue*." *Haridopolos*, 65 So. 3d at 578 (emphases added). Plaintiffs allege no other cognizable interest on behalf of these defendants. Accordingly, they should be dismissed from these actions.

3. The CFO and the Department of Revenue

Plaintiffs allege that the CFO is a proper defendant because he "is the official responsible for depositing and accounting for the fines issued and collected pursuant to section 790.33(3)(c), Florida Statutes." *Weston* Am. Compl. ¶ 19; *County* Am. Compl. ¶ 39. Plaintiffs similarly allege that because "[t]he Florida Department of Revenue is the official State agency responsible for receiving the fines issued and collected pursuant to section 790.33(3)(c), Florida Statutes," the Governor, Attorney

General, Commissioner of Agriculture, and Chief Financial Officer are proper defendants in their official capacity as the collective head of the Department. *Weston* Am. Compl. ¶ 21; *County* Am. Compl. ¶ 42.

Assuming these allegations are correct, Plaintiffs conflate "depositing" and "accounting for" fines with enforcement authority sufficient to require the CFO and heads of the Department of Revenue to defend suit. The only "enforcement" contemplated by the statute is the *imposition* of fines, and the CFO and Department have no authority to do that. The statute specifically charges "the court" with imposing and collecting fines in actions brought by private citizens and organizations. § 790.33(3)(c), Fla. Stat. ("If *the court* determines that a violation was knowing and willful, *the court* shall assess a civil fine . . . ." (emphases added)); *see also id.* § 28.246(3) ("[F]ines . . . shall be *enforced* by order of the courts, collected by the clerks of the circuit and county courts, and disbursed in accordance with authorizations and procedures as established by general law." (emphasis added)).

Moreover, it is the imposition of fines that causes the injury of which Plaintiffs complain, not the bank account in which the fines end up or the accountant who records them. The CFO and the Department therefore have no "actual, present, adverse and antagonistic interest in the subject matter" of these actions. *Martinez*, 582 So.2d at 1170 (quoting *May*, 59 So. 2d at 639). In other words, an order against the CFO and the Department would not "remedy the constitutional

violation alleged in the complaint." *Scott*, 214 So. 3d at 747. "Private litigants who assert violations of the [statute] may defend the constitutionality of the Act, and they will not be constrained by any [order] that could be issued against the state officials in this action." *Digital Recognition Network, Inc.*, 803 F.3d at 958.

It is indeed "absurd" to suggest that such generic administrative authority gives rise to the requisite interest in upholding the statute's constitutionality. *See Scott*, 214 So. 3d at 747 ("It is absurd to conclude that the Governor's general executive power under the Florida Constitution is sufficient to make him a proper defendant whenever a party seeks a declaration regarding the constitutionality of a state law."). If this Court were to hold otherwise, the CFO and Department may be required to defend any number of actions pertaining to fees, licenses, taxes, imposts, fines, penalties, and all other monies that inure to the State. *Cf. Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003) ("If a governor's general executive power provided a sufficient connection to state law to permit jurisdiction over him, any state statute could be challenged simply by naming the governor as a defendant.").

4. The Auditor General

Plaintiffs allege that the Auditor General is a proper defendant because, "through her audit and review functions under section 11.45, Florida Statutes, the Auditor General is the official responsible for ensuring that municipalities do not

use public funds for improper purposes. Thus, the Auditor General would be the responsible official to enforce the provision in section 790.33(3)(d), Florida Statutes, that prohibits the use of public funds to defend against or reimburse expenses incurred in defending an alleged violation of section 790.33(1), Florida Statutes." *Daley* Am. Compl. ¶ 18; County Am. Compl. ¶ 41.

Plaintiffs are mistaken. As her title would suggest, the Auditor General is the State's independent auditor. The Florida Constitution charges her only to "audit public records and perform related duties as prescribed by law or concurrent resolution." Art. III, § 2, Fla. Const. Florida law, in turn, authorizes the Auditor General to conduct a wide range of operational, performance, compliance, and financial audits. *See* § 11.45(3), Fla. Stat. That authority is limited to the review and inspection of pertinent materials. *See id.* § 11.45(1)(a), (c), (g), (h) (defining "audit" as the "examination" of records and other materials). The Auditor General is also authorized and, in some circumstances, required to report her findings to the Legislative Auditing Committee. *See id.* § 11.45(7).

No provision of law authorizes the Auditor General to enforce state law generally or Section 790.33(3)(d) specifically. In other words, should the Auditor General identify a violation of state law, she has no authority to take corrective action against the offending party. An order against the Auditor General therefore would not "remedy the constitutional violation alleged in the complaint," so she is not a

proper defendant in these actions. *Scott*, 214 So. 3d at 747; *see also Digital Recognition Network, Inc.*, 803 F.3d at 958.

Indeed, the exercise of enforcement power by the Auditor General could be contrary to her duty under Florida law to maintain objectivity in her audit and review functions by conducting her office "independently." *See* § 11.45(2), Fla. Stat. The exercise of enforcement power by the Auditor General would also give rise to serious constitutional questions, as her office is situated within and operates at the pleasure of the Legislature, not the Executive branch. *See* Art. III, § 2, Fla. Const.; § 11.45(7), Fla. Stat.; *see* Art. II, § 3, Fla. Const. ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."); *see, e.g.*, *Fla. Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d at 139 ("[S]hould any doubt exist that an act is in violation . . . of any constitutional provision, the presumption is in favor of constitutionality. To overcome the presumption, the invalidity must appear beyond reasonable doubt, for it must be assumed the legislature intended to enact a valid law." (internal citation and quotation marks omitted)).

To be sure, the Auditor General may, in the course of conducting an audit, identify illegal conduct by state or local officials, and she may report that illegal conduct to those with enforcement authority. But that possibility is speculative at

best and therefore cannot form the basis of a justiciable case or controversy. *See Fla. Consumer Action Network*, 830 So. 2d at 152. This is especially so with respect to local government audits because, due to the limited nature of the Auditor General's resources, such audits are almost always conducted by private auditors. *See* § 218.39, Fla. Stat. Nor, in any event, does the mere possibility that the Auditor General may report illegal conduct to other officials distinguish her from any other Floridian. She therefore lacks a sufficient connection to the statute at issue to have an "actual, present, adverse and antagonistic interest in the subject matter" of these actions. *Martinez*, 582 So. 2d at 1170 (quoting *May*, 59 So. 2d at 639).

5. The Broward County Sheriff

The *Daley* Plaintiffs allege that the Broward County Sheriff is a proper defendant because "he is responsible for enforcing court orders and judgments." *Daley* Am. Compl. ¶ 27. Plaintiffs do not allege that the Sheriff is charged with enforcing Section 790.33, and indeed the Sheriff has no authority to enforce that provision. Plaintiffs point instead to the Sheriff's general duty to enforce *court orders and judgments*. But the Sheriff has that duty in every case. It applies without regard to the subject of the underlying lawsuit and bears no relationship to whatever provision of law gave rise to such lawsuit. It therefore establishes no connection whatsoever between the Sheriff and any substantive provision of law, including Section 790.33.

Much like Plaintiffs' allegations regarding the CFO and Department of Revenue, it is "absurd" to suggest that such generic administrative authority establishes a connection between the Sheriff and the challenged provisions sufficient to require him to defend suit. *See Scott,* 214 So. 3d at 747. If the rule were otherwise, the Sheriff may be required to defend suit in virtually any challenge to any state statute or local ordinance. *Cf. Women's Emergency Network v. Bush*, 323 F.3d 937, 949 (11th Cir. 2003) ("If a governor's general executive power provided a sufficient connection to state law to permit jurisdiction over him, any state statute could be challenged simply by naming the governor as defendant.").

6. The Broward County State Attorney

The *Daley* Plaintiffs allege that the Broward County State Attorney is a proper defendant because, "[u]nder Article V, Section 17 of the Florida Constitution, and Chapter 27 of the Florida Statutes, as State Attorney, he is charged with defending all suits in this judicial circuit in which the state is a party and prosecuting all violations of Florida's criminal laws within Broward County, Florida." *Daley* Am. Compl. ¶ 25.

First, contrary to Plaintiffs' suggestion, the State Attorney has no authority to "prosecute" violations of Section 790.33, because the statute's enforcement provisions are civil, not criminal. Section 790.33 creates a private right of action for declaratory and injunctive relief and damages, and subjects "knowing and willful"

violators to a potential "civil fine" and possible removal from office. § 790.33(3)(c)-(f).

Second, Florida law charges the Broward County State Attorney with prosecuting and defending suit on behalf of the State only in his circuit—the Seventeenth Judicial Circuit, in and for Broward County. *See* § 27.02(1), Fla. Stat. This case, while originally filed in that court, was transferred to this Court—the Second Judicial Circuit, in and for Leon County—so the State Attorney is not a proper defendant under Section 27.02(1). Moreover, as discussed above, the State itself is an improper defendant, so the State Attorney would not be a proper defendant in this case even if it were still pending in Broward County.

B. Section 790.335

Section 790.335, Florida Statutes prohibits the creation of registries and lists of lawfully owned firearms and their owners. The *County* Plaintiffs challenge paragraphs (4)(a) and (4)(c) of that Section, which provide for enforcement of the prohibition.

Section 790.335(4)(a) makes it a third-degree felony to violate Section 790.335. Paragraph (4)(d) expressly charges the State Attorney for each judicial circuit, and no other state official, with authority to enforce criminal violations of the statute. The *County* Plaintiffs do not name as a defendant the State Attorney for

any judicial circuit,[12] and they do not allege that any named defendant bears any relationship to the State Attorneys' enforcement of Section 790.335(4)(a). Because there is no proper defendant, all claims concerning that provision must be dismissed for lack of a justiciable controversy.

Section 790.335(4)(c) expressly charges the Attorney General, and no other state official, with authority to bring a civil action to enforce certain violations of the statute. Accordingly, in an appropriate case, the Attorney General may properly be named as a defendant in a challenge to Section 790.335(4)(c). This is not such a case because, as explained above, Plaintiffs do not allege that the Attorney General has threatened to enforce the statute against them. But even if she had, the *County* Plaintiffs allege no connection between Section 790.335(4)(c) and the other named defendants, and there is none. All defendants other than the Attorney General must therefore be dismissed as improper parties to the claims concerning 790.335(4)(c).

III. Plaintiffs Lack Standing Because Local Governments And Their Officials Are Barred From Challenging Legislation Affecting Their Duties.

As the Florida Supreme Court has explained, "[d]isagreement with a constitutional or statutory duty, or the means by which it is to be carried out, does not create a justiciable controversy or provide an occasion to give an advisory

[12] Only the *Daley* Plaintiffs name as a defendant the Broward County State Attorney, but the *Daley* Plaintiffs do not challenge Section 790.335.

judicial opinion." *Dep't of Revenue of State of Fla. v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981), *superseded by statute on other grounds as stated in Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So. 2d 793 (Fla. 2008). Accordingly, "[s]tate officers and agencies are required to presume that the legislation affecting their duties is valid, and they do not have standing to initiate litigation for the purpose of determining otherwise." *Echeverri*, 991 So. 2d at 803 (internal quotation marks omitted). This rule applies with equal force to litigation brought by counties, municipalities, and their officials. *See, e.g.*, *Dep't of Agric. & Consumer Servs. v. Miami-Dade Cty.*, 790 So. 2d 555, 557-58 (Fla. 3d DCA. 2001). Plaintiffs therefore lack standing to challenge Sections 790.33 and 790.335, which Plaintiffs allege have affected their duties by "chilling" their desire to regulate firearms and ammunition.

To be sure, a local official may challenge a state statute if he can show that "he will be injured in person, property or some material right by its enforcement." *Id.* at 558 (quotation marks omitted). However, "the *threat* of suit, without more, does not give public officers or agencies a 'sufficiently substantial interest or special injury to allow the court to hear the challenge.'" *Id.* (emphasis in original). "[T]he *only* time that a public officer or agency may raise the constitutionality of a state statute is in a defensive posture." *Id.* (emphasis in original); *see also Lewis*, 416 So. 2d at 458 (holding that, if "the operation of a statute is brought into issue in litigation

brought by another against a state agency or officer, the agency or officer may *defensively* raise the question of the law's constitutionality" (emphasis added)); *Turner v. Hillsborough Cty. Aviation Auth.*, 739 So. 2d 175, 178 (Fla. 2d DCA 1999), *approved sub nom. Fuchs v. Robbins*, 818 So. 2d 460 (Fla. 2002) (observing that "the constitutionality of a statute can be raised defensively by a public official," and holding that the official lacked standing because he was the plaintiff).

As discussed above, Plaintiffs do not allege that Defendants have threatened them with enforcement under the challenged provisions, much less that Defendants have brought such enforcement against them. Accordingly, Plaintiffs lack standing.

An exception permits local officials to "challenge the constitutionally of a law" that "require[s] the expenditure of public funds." *Island Resorts Investments, Inc. v. Jones*, 189 So. 3d 917, 922-23 (Fla. 1st DCA 2016). The Florida Supreme Court and First DCA have recently cautioned that this exception is "narrow." *Id.* at 922 (quoting *Echeverri*, 991 So. 2d at 797). The provisions Plaintiffs challenge do not fall within this exception because they simply do not "require" the expenditure of public funds. The mere possibility of civil liability is insufficient. *See Dep't of Agric. & Consumer Servs.*, 790 So. 2d at 557-58 (holding that the *threat* of suit, without more, does not give public officers or agencies a "sufficiently substantial interest or special injury to allow the court to hear the challenge").

Indeed, the First DCA has held that, even if "the state holds a powerful stick which may be utilized to persuade local governments" and that stick "[u]ndoubtedly, . . . will, in some cases, add to the cost of local governance," that fact, without more, does not give local officials standing to challenge a state statute. *Santa Rosa Cty.*, 642 So. 2d at 623-24, *disapproved in part on other grounds*, 661 So. 2d 1190 (Fla. 1995). "[S]uch increased cost of governance, even to fund actions that are not necessarily desired by the majority of voters within the jurisdiction of a local government . . . does not fit within an exception to the general rule prohibiting public officers and agencies from challenging a law they are bound to apply." *Id.*[13]

One of the *Weston* Plaintiffs, Amy Turkel, is a private citizen who alleges that she is "interested in local efforts" to regulate firearms and that, "[w]henever she has attempted recently to petition her elected officials on this issue, she has been told that any discussions on the subject would be futile since Florida law does not allow for any local efforts relating to regulation of firearms." *Weston* Am. Compl. ¶ 13. Ms. Turkel joins two counts of the *Weston* Complaint, claiming that Section

[13] Even if the mere possibility of civil liability were sufficient to invoke the public funds exception, only a sliver of these actions could be allowed to proceed. Local officials who violate Section 790.33 may be subject to fines and removal from office by the Governor, but only if the court finds that the violation was "knowing and willful." § 790.33(3)(c), (e), Fla. Stat. But, in that case, the statute expressly bars the use of public funds to reimburse the official, who is made personally liable. *Id.* § 790.33(3)(d). These provisions fall outside even the broadest reading of the exception.

790.33's enforcement provisions "cause[] constituents like Turkel to refrain from constitutionally protected speech or expression with their elected officials out of fear that their public comments could lead to severe sanctions against the very municipality they seek to improve." *Id.* ¶ 89. Ms. Turkel claims that this discouragement interferes with her freedom of speech and right to instruct her representatives. *Id.*; *see also* ¶¶ 114-125.[14]

Ms. Turkel says that she is "not alleging that local residents are entitled to have laws enforced that are inconsistent with or preempted by state statute." *Id.* ¶ 119. She is, however, alleging "that local constituencies have a constitutional right to petition their democratically elected local officials and invoke their assistance in enacting local legislation, even if that legislation is ultimately determined to be unenforceable and merely symbolic." *Id.* The right Ms. Turkel claims simply is not abridged by Section 790.33. Nothing in Section 790.33 prohibits local officials from discussing firearms regulation with constituents. Rather, the statute prohibits only the "enactment" or "enforcement" of preempted regulations.

Ms. Turkel points to Section 790.33(3)(f), which creates a private right of action in private persons and organizations "adversely affected by any ordinance" that was "promulgated or caused to be enforced" in violation of the preemption

[14] Even if Ms. Turkel has standing, she is a party only to Counts four and seven of the *Weston* Complaint. All other counts must be dismissed.

provision. Ms. Turkel claims that the term "promulgat[ion]" covers a broader range of conduct, potentially prohibiting even mere discussion about firearms regulation. *Weston* Am. Compl. ¶¶ 84-88. The First DCA has already explained that this is incorrect. *See Fla. Carry, Inc.*, 212 So. 3d at 461-64. "Promulgation" is co-extensive with "enactment." *Id.* at 463-64. Thus, to the extent Ms. Turkel believes she has a cause of action because her local officials have refused to speak with her, those officials are the proper defendants.[15] Because Ms. Turkel alleges no cognizable injury caused by Defendants, she lacks standing.

Because no Plaintiff has standing in these actions, they must be dismissed for lack of a justiciable case or controversy.

[15] Ms. Turkel also claims that her rights to petition and instruct "have no value if the constituents invoking them are faced with the certainty that, as to the particular topics solely of the Legislature's choosing, their concerns *must* be ignored by their elected officials at the risk of facing significant fines and removal from office." *Id.* ¶ 120. To the contrary, these rights have enormous value. They "allow[] citizens to express their ideas, hopes, and concerns to their government and their elected representatives." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388 (2011). In furtherance of that interest, these rights shelter citizens from civil and criminal liability premised on petitioning activity. *See Curry v. State*, 811 So. 2d 736, 743 (Fla. 4th DCA 2002). They also prohibit public employers from terminating employees based on petitioning activity, *see Borough of Duryea, Pa.*, 564 U.S. at 383, and protect "[t]he right of access to courts for redress of wrongs," *id.* at 387 (quotation marks omitted). But they do not ensure that citizens' concerns will be heard or acted upon in any particular manner.

IV. Plaintiffs Lack Standing To Challenge Section 790.33(3)(c)-(e) Because They Fail To Allege A Legally Cognizable Injury Caused By Those Provisions.

Plaintiffs do not dispute that the State's decision to preempt local regulation of firearms and ammunition was constitutional. *See Weston* Am. Compl. ¶ 26 ("Plaintiffs do not dispute in this action the power of the State, generally, to preempt certain subject matters from regulation by municipalities."); *County* Am. Complaint ¶ 9 ("This action does not challenge the ability of the State of Florida to preempt local government regulation of firearms and ammunition. . . . But this action *does* challenge the constitutionality of the State Firearm Penalties" (emphasis in original)); *Daley* Am. Compl. at 29 (challenging "the Punitive Provisions" but not "the Preemption Provision"). Accordingly, Plaintiffs do not allege injury in that the statute preempts regulations they wish to enact. Instead Plaintiffs allege injury in that (1) they wish to enact regulations they believe in good faith are *not* preempted, and (2) the threat of civil liability posed by the penalty provisions chills them from taking such action. *See Weston* Am. Compl. ¶¶ 32, 36; *County* Am. Compl. ¶¶ 8, 12, 15; *Daley* Am. Compl. ¶¶ 46-47. But that alleged injury bears no causal relationship to paragraphs (3)(c)-(e) of Section 790, which create penalties that apply only to "knowing and willful" violations of the statute and do not apply to regulations that, while preempted, were enacted under the good faith belief that they were within the purview of local government. *See Weston* Am. Compl. ¶ 55 (arguing that the penalty

provisions "necessarily require an inquiry into the motives and intent of the elected official in voting as he or she did, in order to potentially punish that local legislator for such a vote"); *County* Am. Compl. ¶ 87 (same); *Daley* Am. Compl. ¶ 71 (same). Plaintiffs therefore lack standing to challenge Section 790(3)(c)-(e).

Plaintiffs point to the last sentence of Section 790.33(3)(b), which provides that, in certain actions, "[i]t is no defense that in enacting the ordinance, regulation, or rule the local government was acting in good faith or upon advice of counsel." But that provision bars good faith and advice of counsel defenses only in the actions to which the provision is addressed—namely, actions to "declare the improper ordinance, regulation, or rule invalid and issue a permanent injunction against the local government prohibiting it from enforcing such ordinance, regulation, or rule." § 790.33(3)(b), Fla. Stat.[16] Nothing in the statute suggests those defenses are also barred as to the penalties created by paragraphs (3)(c)-(e), which, as discussed

[16] In full, Section 790.33(3)(b) provides that

> If any county, city, town, or other local government violates this section, the court shall declare the improper ordinance, regulation, or rule invalid and issue a permanent injunction against the local government prohibiting it from enforcing such ordinance, regulation, or rule. It is no defense that in enacting the ordinance, regulation, or rule the local government was acting in good faith or upon advice of counsel.

§ 790.33(3)(b), Fla. Stat.

above, expressly require plaintiffs to prove that an alleged violation of the statute was "knowing and willful."

CONCLUSION

For the foregoing reasons, the Court should dismiss these actions for lack of a justiciable case or controversy.

Respectfully submitted on this 9th day of July, 2018,

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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 9th, 2018, by using the E-Filing Portal, which will send a notice of electronic filing to all counsel of record.

/s/ Edward M. Wenger
Edward M. Wenger