Filing # 89215188 E-Filed 05/08/2019 07:39:58 PM

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 RON DESANTIS, 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.
_____/

Leon County Case No. 2018 CA 001509 (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' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

ARGUMENT[1]

Plaintiffs argue that (1) enforcement of Sections 790.33 and 790.335 against local officials would violate legislative immunity; (2) enforcement of Section 790.33 against local governments would violate governmental immunity; (3) Subsection 790.33(3)(e) violates Article IV, Section 7 of the Florida Constitution; (4) Section 790.33 violates free speech, association, petition, and instruction rights; (5) Section 790.33 is unconstitutionally vague; (6) Section 790.33 unconstitutionally impairs antecedent contractual obligations; (7) Section 790.33 usurps the role of the judiciary; and (8) Section 790.33 is arbitrary and irrational. Each claim lacks merit.[2]

[1] As used herein, the parties' motions for summary judgment are referred to as "DMSJ" and "PMSJ," and the parties' opposition briefs are referred to as "DOMSJ" and "POMSJ." Except as otherwise stated herein, the term "Defendants" refers to the State of Florida, the Attorney General, and the FDLE Commissioner.

The Governor of Florida is separately represented and is not a party to this Memorandum or to Defendants' MSJ. The Commissioner of Agriculture joins this Memorandum only in part; specifically, the Commissioner's position is that the Department of Agriculture (and the Commissioner specifically) is an improper defendant and should therefore be dismissed from these cases. *See* DMSJ at 8 n.3; DOMSJ at 3 n.1.

[2] Plaintiffs voluntarily dismissed their claim that Section 790.33 violates Article VIII, Section 2(b) of the Florida Constitution. *See* POMSJ at 3 n.2.

I. Enforcement Of The Challenged Provisions Against Local Officials Would Not Violate Legislative Immunity.

Plaintiffs argue that enforcement of the challenged provisions against local officials would violate "legislative immunity." But the legislative immunity local officials enjoy derives exclusively from the common law, not constitutional law. *See Fla. House of Representatives v. Expedia, Inc.*, 85 So. 3d 517, 523-24 (Fla. 1st DCA 2012) ("It is clear from these authorities that the privileges and immunities protecting all public officials, including members of the legislature, arise from the common law."). It is well-established that common law immunities exist at the pleasure of the Legislature, and that the Legislature may "do away with the[m] altogether," *McNayr v. Kelly*, 184 So. 2d 428, 430 n.6 (Fla. 1966), as long as it does so "clearly," *Bates v. St. Lucie Cty. Sheriff's Office*, 31 So. 3d 210, 213 (Fla. 4th DCA 2010). By expressly creating civil penalties for local officials who willfully violate the statute, the challenged provisions do just that—they abrogate any common-law immunity that would otherwise shield local officials from the statutory penalties. *See* Section I.C *infra*; DMSJ at 24-25; DOMSJ at 5-6.

Plaintiffs' argue that immunity for local government officials "derives not only from Florida common law, but also from the separation of powers provision in the Florida Constitution, Art. II, § 3, Fla. Const., as well as federal common law." POMSJ at 4. Plaintiffs also contend that, even if the Legislature can abrogate legislative immunity, it did not do so here. *Id.* at 11. These arguments fail.

A. The Florida Constitution Does Not Grant Local Officials Immunity From Statutory Causes Of Action.

Plaintiffs' argument that local officials are clothed with legislative immunity under "the separation of powers provision in the Florida Constitution," POMSJ at 4 (citing Art. II, § 3, Fla. Const.), fails as a matter of constitutional text, precedent, and logic. The provision on which Plaintiffs rely, Article II, Section 3 of the Florida Constitution, requires the separation of "powers of the *state* government," which "shall be divided into legislative, executive and judicial branches," Art. II, § 3, Fla. Const. (emphasis added). The provision says nothing about the relationship between *state* government and *local governments*. *See Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992) (observing that the provision addresses only the branches "of our *state* government" and "was not intended to apply to local governmental entities and officials, such as those identified in articles VIII and IX" (emphasis added)).

A vertical separation of powers doctrine between the State and its local governments (akin to that which governs the relationship between the federal and state governments) would, moreover, be inconsistent with Article VIII of the Florida Constitution, which provides that counties and municipalities "may be created, abolished or changed by law." Art. VIII, §§ 1(a), 2(a), Fla. Const. As the Florida Supreme Court has explained, the Constitution thereby "establishes the constitutional superiority of the Legislature's power over municipal power." *Masone v. City of Aventura*, 147 So. 3d 492, 494-95 (Fla. 2014). To the same extent, "[t]he

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." *Weaver v. Heidtman*, 245 So. 2d 295, 296 (Fla. 1st DCA 1971); DOMSJ at 7 n.4.

Plaintiffs have failed to identify a single case holding that separation of powers principles in any way constrain that legislative prerogative. They instead point to cases addressing a very different question: whether the courts (rather than the legislature) have the power to "second guess" local policy decisions. POMSJ at 7-8. Specifically, those cases stand for the unremarkable proposition that "[j]udicial intervention through private tort suits into the realm of discretionary decisions relating to basic governmental functions would require the judicial branch to second guess the political and police power decisions of the other branches of government and would violate the separation of powers doctrine." *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985). In other words, the judiciary lacks power to decide political questions. As discussed more fully below and in Defendants' earlier briefing, *see* Section II *infra*; DOMSJ at 9-10, there is no such concern where the question before the court is whether officials have "violate[d] a . . . statutory provision," because applying a "statutory duty of care" (here, that local governments shall not regulate firearms) is a quintessentially judicial task. *Id.* at 919.

Cases "declin[ing] to rewrite local ordinances or re-zone properties," POMSJ at 8 & n.3 (citing cases), are inapposite for the same reason, and for the additional reason that such cases concern alleged interference with a "legislative power properly delegated to a municipality by the Legislature," *id.* (quoting *City of Miami Beach v. Lachman*, 71 So. 2d 148, 153 (Fla. 1953) (Roberts, J., concurring)). Here, by contrast, the Legislature has properly exercised its constitutional prerogative to *limit* local government authority.

B. Federal Common Law Does Not Bar State Legislatures From Abrogating Legislative Immunity.

Plaintiffs do not argue that legislative immunity (other than for members of Congress) derives from the United States Constitution; they instead contend that state legislatures cannot waive local officials' legislative immunity because that immunity exists as a matter of "federal common law." POMSJ at 6. This argument fails for three reasons.

First, as a general matter, "[t]here is, of course, 'no federal . . . common law.'" *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (quoting *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Indeed, the U.S. Supreme Court "has recognized" federal common law only in "limited areas" that the Court has held are "'few and restricted' and fall into essentially two categories": "those in which Congress has given the courts the power to develop substantive law," and, in the

absence of a federal statute, "those in which a federal rule of decision is 'necessary to protect uniquely federal interests.'" *Id.* (citations omitted).

No federal statute clothes local officials with legislative immunity, and such immunity is not "'necessary to protect uniquely federal interests,'" which are limited to "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating conflicting rights of States or our relations with foreign nations, and admiralty cases." *Id.* at 641. The cases cited by Plaintiffs are not to the contrary, as they merely observe that, under certain circumstances, "state law *can* be preempted by federal common law." POMSJ at 6 (quoting *N.J. Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012) (emphasis added)). As discussed above, that is true, but only in limited circumstances not present here.

The U.S. Supreme Court has never suggested that legislative immunity exists as a matter of "federal common law." Rather, in the decisions cited by Plaintiffs, the Court has explained that such immunity existed *at* common law in the sense that "[t]he immunity of legislators from civil suit for what they do or say as legislators has its roots in the parliamentary struggles of 16th- and 17th-century England." *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 403 (1979). And the Court held that "Congress, in enacting § 1983 as part of the Civil Rights Act of 1871" did not intend "to overturn th[at] tradition." *Id.*

Nothing in the decisions of the Supreme Court, or the other cases cited by Plaintiffs, suggests that the common law tradition of legislative immunity *for local officials* protects "uniquely federal interests." *Tex. Indus., Inc.*, 451 U.S. at 640. *Thillens, Inc. v. Community Currency Exchange* and *Montgomery County v. Schooley* merely cite the Supreme Court decisions discussed above for the unremarkable proposition that "the protection afforded state legislators from liability under federal law for actions within the sphere of legitimate legislative activity arises out of the common law doctrine of official immunity." *Thillens, Inc.*, 729 F.2d at 1128, 1129 (7th Cir. 1984); *see Montgomery Cty.*, 627 A.2d 69, 74 (Md. App. 1993). Those cases in no way suggest that legislative immunity exists as a matter of "federal common law" in the sense that it preempts state laws that impose liability on local officials. Nor could they, as neither case presented such a question.

Second, even where the courts have recognized a "federal common law" immunity doctrine, the U.S. Supreme Court has made clear that such doctrines preempt state law causes of action only in cases in which "the interests of the United States [would] be *directly affected*." *In re Fort Totten Metrorail Cases*, 895 F. Supp. 2d 48, 86 (D.D.C. 2012) (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988)) (emphasis in original). For example, federal common law immunity "shield[s] Government contractors from liability for design defects in military equipment." *Boyle*, 487 U.S. at 504. But that doctrine preempts state law claims only

when they would otherwise affect "the performance of federal procurement contracts, *id.* at 506, or "directly affect the terms of Government contracts," *id.* at 507; *see*, *e.g.*, *Olivares v. Brown & Gay Eng'g, Inc.*, 401 S.W.3d 363, 374 (Tex. App. 2013), *aff'd* 461 S.W.3d 117 (Tex. 2015) (holding that government contractor immunity does not otherwise bar state law claims).

The statutes at issue here have no impact on the federal government, let alone a "direct" impact. To the contrary, the statutes pertain only to the relationship between the State of Florida and its local governments.

Third, immunity from suit recognized in the cases cited by Plaintiffs applies only to officials engaged in "legitimate legislative activity," *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998), *i.e.*, "matters properly before" them, *Thillens, Inc.*, 729 F.2d at 1129. Under Section 790.33, Florida Statutes, the regulation of firearms is not a matter "properly before" local officials. Lawsuits premised on such regulation therefore cannot be barred by legislative immunity.

C. By Expressly Subjecting Local Officials To Liability, The Challenged Provisions Clearly Abrogate Any Immunity That Would Otherwise Shield Local Officials From Penalties Under The Statute.

Plaintiffs further contend that, even if the State were free to abrogate whatever immunity local officials enjoy, the Legislature did not "clearly" do so here. *See* POMSJ at 11. Plaintiffs' primary argument seems to be that, when considering Section 790.33, a legislative committee's bill analysis acknowledged "[t]he general

rule under the common law . . . that legislators enjoy absolute immunity from liability for performance of legislative acts." POMSJ at 11 n.8 (quoting SOF, Ex. 19 at 4). The analysis on which Plaintiffs rely merely observes what legislative staff believed to be "[t]he general rule" regarding immunity. POMSJ at 11 n.8 (quoting SOF, Ex. 19 at 4). To the extent the analysis in relevant, it indicates the Legislature's intent to *deviate* from that rule. *See* SOF, Ex. 19 at 4 (stating that "an express and clear preemption would remove discretion from local government officials," rendering such local regulation "'ministerial,'" as opposed to "'legislative'" in nature).[3]

Indeed, no other conclusion can be drawn from the plain language of the statute, which expressly subjects local officials to liability. As courts have repeatedly held, when the Legislature does that, it "clearly" abrogates any otherwise applicable immunity. *See Bifulco v. Patient Bus. & Fin. Servs., Inc.*, 39 So. 3d 1255, 1257 (Fla. 2010) ("[U]nder the plain language of the Workers' Compensation Law, actions for workers' compensation retaliation are authorized against the State and any of its subdivisions, as employers," waiving "sovereign immunity for workers' compensation retaliation claims when the State and its subdivisions are acting as employers."); *Maggio v. Fla. Dep't of Labor & Employment Sec.*, 899 So. 2d 1074,

[3] In any event, the Florida Supreme Court has cautioned against reliance on legislative staff analysis, as "[t]he language of the statute should be enough." *Kasischke v. State*, 991 So. 2d 803, 810 (Fla. 2008).

1078-79, 1081 (Fla. 2005) (explaining that the Florida Civil Rights Act's inclusion of the State as an "employer" subject to liability was "a waiver of sovereign immunity independent of the waiver contained in section 768.28").

Plaintiffs also suggest that the subsection of the statute authorizing fines against certain local officials, *see* § 790.33(3)(c), Fla. Stat. does not "clearly" abrogate legislative immunity with respect to those fines because, in Plaintiffs view, "[i]t is unclear whether the 'knowing and willful' determination is made with respect to the local government's enactment" of a regulation "or an individual legislator's vote." POMSJ at 12 (citing § 790.33(3)(c), Fla. Stat.). As discussed more fully in Defendants' earlier briefing, the latter interpretation of the statute is correct. *See* DMSJ at 33-34; DOMSJ at 30-31. In any event, Plaintiffs' argument misses the point: by expressly subjecting certain local officials to personal liability, the statute clearly abrogates the immunity of any officials to which it applies.

Finally, Plaintiffs contend that, "where a particular common law right is so engrained in Florida's history, the Legislature is without power to abolish the right 'unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.'" POMSJ at 12-13 (quoting *Kluger v. White*, 281 So. 2d 1 (Fla. 1973)). That rule is limited to "the statutory abolition" of a would-be plaintiff's "right to a cause of action" unless the Legislature "provid[es] an alternative

protection to the injured party," as required by the "access to courts" provision set forth in Article I, Section 21 of the Florida Constitution. *Id.* at 3-4. The rule does not bar the Legislature from *enhancing* access to the courts by eliminating common law immunity, as it did here. *See McNayr*, 184 So. 2d at 430 n.6 (explaining that common law immunities exist at the pleasure of the Legislature, which may "do away with the[m] altogether").

II. Enforcement Of The Challenged Provisions Against Local Governments Does Not Implicate The "Governmental Function" Immunity Doctrine.

By expressly creating a cause of action against local governments that violate Section 790.33(3)(a), the Legislature waived local governments' sovereign immunity as to that cause of action. *See* Section I.C *supra*; DOMSJ at 9; DMSJ at 24-25. Article X, Section 13 of the Florida Constitution provides that the Legislature may waive immunity of both the State and its subdivisions for "*all* liabilities now existing or hereafter originating." Art. X, § 13, Fla. Const. (emphasis added); *see Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp.*, 908 So. 2d 459, 471-72 (Fla. 2005).

Plaintiffs' response is that while "the Legislature does have the general authority to waive some aspects of sovereign immunity," it cannot "waive governmental function immunity" because "governmental function immunity, unlike other types of sovereign immunity, is protected by the constitutional principle

of separation of powers." POMSJ at 15. The source of sovereign immunity is irrelevant, however, because the Constitution expressly says that the Legislature may waive it. *See* Art. X, § 13, Fla. Const.

The cases on which Plaintiffs rely indeed confirm the Legislature's power to waive sovereign immunity by creating a statutory cause of action. Those cases hold that a statutory waiver of sovereign immunity may be ineffective where there is no "standard of care" for courts to apply. *Trianon Park Condo. Ass'n, Inc.*, 468 So. 2d at 917-18. For example, the Legislature waived sovereign immunity for certain common law tort actions, but there is no common law standard of care for "policy-making, planning or judgmental governmental functions"—*i.e.* "discretionary functions," *Wallace v. Dean*, 3 So. 3d 1035, 1053 (Fla. 2009) (citing *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1020 (Fla. 1979)), and "the statute waiving sovereign immunity did not establish any new duty of care for governmental entities," *Trianon Park Condo. Ass'n, Inc.*, 468 So. 2d at 917. Absent a statute providing such a duty, "[j]udicial intervention through private tort suits into the realm of discretionary decisions relating to basic governmental functions would require the judicial branch to second guess the political and police power decisions." *Id.* at 918. In other words, the courts would have to undertake a quintessentially legislative task, in violation of Article II, Section 3 of the Florida Constitution.

That concern is not present where, as here, the cause of action is premised on a local government's "violation of . . . statutory rights," because determining compliance with statutes is a quintessentially judicial task. *Trianon Park Condo. Ass'n, Inc.*, 468 So. 2d at 918. Section 790.33 waives sovereign immunity only in lawsuits alleging that a local government has violated the statute. Nothing in the statute requires courts to "second guess the political and police power decisions" of officials. *Id.* The statute merely requires the courts to enforce a policy decision of the Legislature—that the regulation of firearms is reserved to the State—and to hold those who violate the statute responsible.

The fallacy of Plaintiffs' position is further evinced by taking the argument to its logical conclusion. When applicable, the doctrine on which Plaintiffs' rely renders governments "immun[e] to suit," because "it is the trial itself that constitutes the material harm." *Freeport v. Beach Cmty. Bank*, 108 So. 3d 684, 687 (Fla. 1st DCA 2013) (discussing governmental function immunity). If the doctrine continued to have that effect despite the enactment of a statute prohibiting local regulation in a given field, governments would be immune not only to damages under the statute, but also suits for declaratory and injunctive relief, which Plaintiffs concede are "the ready cure for any local governments that venture too far into the area of preemption." POMSJ at 48. Citizens would be powerless to enforce not only Section 790.33, but also the State's many other unquestionably lawful preemption statutes,

rendering ineffectual those statutes as well as the constitutional provisions allowing the Legislature to enact them.

Plaintiffs contend that, because Section 790.33 deprives local governments of any good faith or advice of counsel defense, the "effect" of the statute "is not, as Defendants claim, to prohibit unlawful actions, but" to prevent "the enactment of ordinances or regulations that could arguably fall within the scope of the Preemption Law." POMSJ at 16-17. That is, if true, irrelevant. The absence of those defenses has no bearing on the question of sovereign immunity. Even if it did, as discussed above, Plaintiffs concede that suits for declaratory and injunctive relief "are the ready cure for any local governments that venture too far into the area of preemption," POMSJ at 48, and the statute abolishes good faith and advice of counsel defenses only as to claims for declaratory and injunctive relief, *see* § 790.33(3)(b), Fla. Stat.

III. Plaintiffs Fail To Establish That Section 790.33(3)(e), Florida Statutes, Is Invalid Insofar As It Gives the Governor Authority To Remove Persons Who Knowingly And Willfully Violate the Statute.

In their Brief in Opposition to Defendants' MSJ, Plaintiffs "contend that the Florida Constitution prescribes how an elected official may be removed from office and that the Legislature lacks the authority to vary that process." POMSJ at 23.

1. Article IV, Section 7 of the Florida Constitution does not say that the removal process it establishes is exclusive. It merely provides that the Governor may

suspend county officers for certain reasons, *id.* § 7(a), and that the Senate may then remove them from office, *id.* § 7(b). The Governor may suspend municipal officers "until acquitted." *Id.* § 7(c). To conclude that the process is exclusive in the sense that the Legislature cannot provide another method by which officials may be removed, the Court would have "to add words to" the provision that "were not placed there by the drafters," which the Florida Supreme Court has held it is "not at liberty" to do. *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 512 (Fla. 2008).

Plaintiffs rely on the interpretive canon of negative implication—*expressio unius est exclusio alterius*—which, when applicable, means that "the expression of one thing implies the exclusion of the other." *Crews v. Fla. Pub. Employers Council 79, AFSCME*, 113 So. 3d 1063, 1071 (Fla. 1st DCA 2013) (citation and internal quotation marks omitted). And Plaintiffs contend that Defendants "fail[] to cite controlling Florida precedent in support of the[ir] argument." POMSJ at 17. But there is no "controlling" precedent that requires courts to apply the canon in every case, to every statute and constitutional provision. As the First DCA has explained, the *expressio unius* canon is "strictly an aid to statutory construction and not a rule of law." *Crews*, 113 So. 3d at 1071. "Virtually all the authorities who discuss the negative implication canon emphasize that it must be applied with great caution, since its application depends so much on context." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012); *see Illinois*

Dep't of Public Aid v. Schweiker, 707 F.2d 273, 277 (7th Cir. 1983) (Posner, J.) ("Not every silence is pregnant; *expressio unius est exclusio alterius* is therefore an uncertain guide.").

Nor is there "controlling" precedent holding that the canon supports the position Plaintiffs advance here, and context supports the conclusion that it does not. If the removal process established by Article IV, Section 7 were exclusive, it would bar alternative removal processes established not only by the Legislature, but also by local governments themselves. Counties and municipalities, too, would be powerless to remove errant officials, an "absurd consequence." *State v. Atkinson*, 831 So. 2d 172, 174 (Fla. 2002); *see*, *e.g.*, Broward Cty. Admin. Code § 1.04(j) ("[O]rdinances enacted pursuant to this sub-section shall also provide procedures for the removal of an employee or individual, other than a Commissioner," including "individuals appointed to Boards, Committees, Agencies, and Authorities."); *id.* § 2.10(A) ("There shall be an Office of the County Attorney. The County Attorney shall be appointed by the County Commission, and may be removed by the County Commission."); *id.* § 3.03(B) ("The right to suspend, remove or discharge any department head is reserved to the County Administrator."); *id.* § 4.01(C) ("The County Commission may remove the individual serving as the County Auditor by an affirmative vote.").

Plaintiffs contend that it makes sense to apply *expressio unius* to limit the power of the Legislature because Article I, Section 1 of the Florida Constitution provides that "[a]ll political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people." POMSJ at 19 (quoting Art. I, § 1, Fla. Const.). In other words, Plaintiffs read Article I, Section 1 as limiting legislative power to specific grants of authority contained in the Florida Constitution. To the contrary, the power "retained by the people" is exercised through their Legislature, except as otherwise provided in the Constitution. *See Browning v. Fla. Hometown Democracy, Inc., PAC*, 29 So. 3d 1053, 1079 (Fla. 2010) ("The legislative branch looks to the [Florida] Constitution not for sources of power but for limitations upon power." (citations and internal quotation marks omitted)).

Like other state courts interpreting their state constitutions, this Court should look to the Florida Constitution "not to determine what the legislature may do, but to determine what it may not do. If an act of the legislature is not forbidden . . . , it must be held valid." *Eberle v. Nielson*, 306 P. 2d 1083, 1086 (Ida. 1957). And because the Constitution requires that such restrictions be express, *see* Art. I, § 1, Fla. Const. ("The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people."), limitations on legislative power cannot be rooted solely in the *expressio unius* canon. *See Eberle*, 306 P. 2d at 1086 (explaining

that, "as a matter of logic in its application, . . . *expressio unius est exclusio alterius*" cannot be applied to limit a state legislature's power under the state constitution (italics added)); *Reale v. Bd. of Real Estate Appraisers*, 880 P.2d 1205, 1213 (Colo. 1994) (same); *Baker v. Martin*, 410 S.E. 2d 887, 891 (N.C. 1991) (same).

2. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006), on which Plaintiffs rely, concerned Article IX, Section 1(a) of the Florida Constitution, which provides that it is "the paramount duty of the state to make adequate provision for the education of all children residing within its borders." The court applied *expressio unius* to conclude that the provision was "a limitation on the Legislature's power" because the provision "mandate[d]" that the Legislature "provide for children's education." *Holmes*, 919 So. 2d at 406 (emphases added). Article IV, Section 7, by contrast, imposes no duty on the Legislature.

Both *Advisory Opinion of Governor Civil Rights* and *Bruner v. State Commission on Ethics* found statutes invalid because they purported to take constitutional power *away* from the Governor, rather than expand his constitutional minimum grant of authority. *See In re Advisory Opinion of Governor Civil Rights*, 306 So. 2d 520, 522 (Fla. 1975) (invalidating a statute that would "automatically" restore civil rights when an inmate is "discharged from parole," because the Constitution gives the Governor the power to restore civil rights at his discretion); *Bruner v. State Comm'n on Ethics*, 384 So. 2d 1339, 1341 (Fla. 1st DCA 1980)

(invalidating a statute because it would give the courts authority to "enter a supersedeas order staying the power of the Governor to suspend"); *id.* at 1340 ("The Governor's power to suspend a public official under the Constitution is independent of, and may not be impinged upon by, a statute."). Here, the statute *supplements* the Governor's baseline authority and therefore does not conflict with the constitutional provision at issue.

3. Even if Article IV, Section 7 were a limitation on legislative power, Plaintiffs' facial challenge fails because Plaintiffs cannot not show that Section 790.33(3)(e) is unconstitutional in all its applications. See PMSJ at 8 (conceding that this is "a facial challenge" and contending that Plaintiffs show that "no set of circumstances exists under which the statute would be valid"). By its terms, the challenged statute applies to any "*person* acting in an official capacity for any entity enacting or causing to be enforced a local ordinance or administrative rule or regulation prohibited under paragraph (a) or otherwise under color of law." § 790.33(3)(e), Fla. Stat. (emphasis added). The removal process set out in Article IV, Section 7 of the Florida Constitution applies to a mere subset of "person[s]," specifically, certain "officer[s]." *See* Art. IV, § 7(a), Fla. Const. ("state *officer* not subject to impeachment") (emphasis added); *id.* ("county *officer*") (emphasis added); *id.* § 7(c) ("municipal *officer*") (emphasis added). And with respect to

municipal officers specifically, Article IV, Section 7 gives the Governor power to suspend only an "*elected* municipal officer." *Id.* § 7(c).

Plaintiffs do not and cannot argue that Section 790.33(3)(e) violates Article IV, Section 7 insofar as the statute authorizes the Governor to remove *other* "person[s]," such as *un*elected municipal officers. Thus, Plaintiffs fail to show that "no set of circumstances exists" under which Section 790.33(3)(e) would be valid. *See Ogborn v. Zingale*, 988 So. 2d 56, 59 (Fla. 1st DCA 2008) ("A facial challenge to a statute is more difficult than an 'as applied' challenge because the challenger must establish that no set of circumstances exists under which the statute would be valid.") (quotation marks and citation omitted).

4. Plaintiffs' reliance on *Marcus v. Scott*, 2012-CA-001260, 2014 WL 3797314 (Fla. 2d Jud. Cir. June 2, 2014), is misplaced. *Marcus* is not binding on this Court. Nor was it correctly decided. As Plaintiffs urge this Court to do, *Marcus* erroneously applied the *expressio unius* canon to conclude that "the Legislature has no power to expand the Governor's suspension power into a removal power." *Id.*

Marcus is, moreover, inapposite because the plaintiffs there challenged only the statute's application to county commissioners, and the court's decision turned in large part on its finding that removal of *those* officials pursuant to the statute would pose "a violation of the constitutional separation of powers." *Id.* Here, Plaintiffs have expressly disclaimed that argument in favor of bringing a facial challenge to the

constitutionality of the statute. POMSJ at 23 (stating that Plaintiffs "have not argued that the Legislature's granting of removal powers to the Governor violates the separation of powers doctrine."). Thus, even assuming *Marcus* was correctly decided, it nevertheless does not support the conclusion that the statute is *facially* unconstitutional, *i.e.*, unconstitutional in its application to all county and municipal officials.

IV. Section 790.33, Florida Statutes Does Not Violate Speech, Association, Petition, Or Instruction Rights.

Plaintiffs contend that Section 790.33 violates the speech, association, petition and instruction rights of citizens and local officials. POMSJ at 27. But the statute regulates only what local officials may do in their official capacity, prohibiting "the enactment or enforcement of firearms regulations." *Fla. Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, 461 (Fla. 1st DCA 2017). Because the First Amendment "confers [no] right to use governmental mechanics to convey a message," the statute does not regulate any expressive or conduct or association. *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 127 (2011). Nor does the statute regulate petitioning or instruction activity.

Plaintiffs do not claim otherwise. *See* PMSJ at 26 ("[T]he Supreme Court has held that legislators do not exercise First Amendment rights through voting on given proposals."); POMSJ at 27-28 ("[T]he Penalty Provisions violate Plaintiffs' speech and association rights for reasons that have nothing to do with the expressive or non-

expressive nature of voting.").[4] Plaintiffs instead argue that the statute "impose[s] substantial burdens" on expression and association rights because, "with no chance of an ordinance being passed, both elected officials and citizens have been (and will continue to be) substantially chilled from engaging in the right to associate with each other in order to advance the passage of firearms safety ordinances." POMSJ at 28.

But "there is a crucial difference between a law that has the inevitable effect of reducing speech because it *restricts or regulates* speech, and a law that has the inevitable effect of reducing speech because it makes particular speech *less likely to succeed*." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1100 (10th Cir. 2006) (en banc) (McConnell, J.) (citing *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790 n.5 (1988)) (emphases added). As the U.S. Supreme Court has explained, "[t]he First Amendment does not prevent restrictions directed at . . . *conduct* from imposing *incidental* burdens on speech." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011)) (emphases added). Florida courts are in accord. *See Top Rank, Inc. v. Fla. State Boxing Comm'n*, 837 So. 2d 496, 502 (Fla. 1st DCA 2003) (rejecting free speech challenge to tax on boxing because (1) boxing

[4] To the extent Plaintiffs suggest that the statute prohibits local officials from "bringing an ordinance to the floor for debate and passage," POMSJ at 28, they are mistaken. The statute prohibits only "the enactment or enforcement of firearms regulations." *Fla. Carry, Inc.*, 212 So. 3d at 461.

is non-expressive conduct, and (2) attendant "commentary and interviews" were outside the scope of the inquiry because they were not "[t]he activity that is being taxed").

In *Walker*, the U.S. Court of Appeals for the Tenth Circuit rejected a claim materially identical to Plaintiffs' claim here. 450 F.3d at 1099. The plaintiffs in that case argued that a Colorado super-majority requirement for "wildlife initiatives" "burden[ed] core political speech by making it more difficult to secure passage of a wildlife initiative." *Id.* Proponents of such measures felt "marginalized" and "silenced" by the requirement and therefore "cowed" in their constitutionally protected speech. *Id.* at 1101.

The Tenth Circuit nonetheless rejected the plaintiffs' claim because it began "from a basic misunderstanding": although "[t]he First Amendment ensures that all points of view may be heard[,] it does not ensure that all points of view are equally likely to prevail." *Id.* "Under the Plaintiffs' theory," the court reasoned, "every structural feature of government that makes some political outcomes less likely than others—and thereby discourages some speakers from engaging in protected speech—violates the First Amendment." *Id.* at 1100. The Tenth Circuit declined to extend the First Amendment in this fashion, and the Court should do the same here.

The cases cited by Plaintiffs are inapposite. In *Meyer v. Grant*, the Court invalidated a law that, unlike here, directly regulated citizens' expressive conduct—

circulation of petitions. *Meyer*, 486 U.S. 414, 422-23 (1988); *see MacMann v. Matthes*, 843 F.3d 770, 778 (8th Cir. 2016) ("[I]n the absence of some showing that the challenged initiative process substantially *restrict[s]* political discourse, the Supreme Court's holding in *Meyer* d[oes] not control." (emphasis added)). *Village of Schaumburg v. Citizens for a Better Environment* likewise invalidated a prohibition on charitable solicitation because the provision restricted *that* expressive conduct. 444 U.S. 620, 633 (1980) ("The issue is whether the Village has exercised its power to regulate solicitation in such a manner as not unduly to intrude upon the rights of free speech.").

Nor did *Carrigan* "expressly le[ave] open the door for this Court to accept the argument advanced by Plaintiffs here." POMSJ at 28. The concern Justice Kennedy expressed in his concurrence is that the law the Court upheld might be read, in a subsequent case, to regulate private relationships and communications by conditioning legislators' authority to vote on the absence of such relationships and communications. *See Carrigan*, 564 U.S. at 130-31 (Kennedy, J., concurring). In other words, legislators would have to give up power—a real-world cost—to maintain private relationships and communications. Here, by contrast, the statute at issue imposes no cost on protected speech and association rights; it simply makes the exercise of those rights "less likely to succeed." *Initiative & Referendum Inst. v. Walker*, 450 F.3d at 1100.

Plaintiffs' further argue that the statute violates' citizens rights to petition and instruct their representatives because, absent the statute, "constituents like Plaintiff Turkel would have a far easier time petitioning their representatives for relief in the form of a valid ordinance." POMSJ at 31. That claim fails for the same reason as Plaintiffs' speech and association claims: the statute does not regulate conduct protected by the rights to petition and instruct, and it is irrelevant that the statute discourages such conduct because it makes petitioning and instruction activity less likely to succeed. As the courts have explained, the rights to petition and instruct "do not guarantee outcomes." *Wilson v. City of Columbia*, No. 2:14-CV-04220-NKL, 2014 WL 4388291, at *3 (W.D. Mo. Sept. 5, 2014); *Tunget v. Smith*, No. CIV. 08-3089, 2010 WL 1241831, at *7 (C.D. Ill. Mar. 19, 2010) ("The First Amendment allows him to petition the government for redress but does not guarantee a certain result."); *see Weston* Compl. ¶ 119.[5]

[5] That Plaintiffs "wish to pass ordinances that they genuinely believe are not preempted by the Preemption Law, but have refrained from doing so," POMSJ at 31 (emphasis omitted), adds nothing to their argument because the statute does not prohibit petitioning or instruction of representatives even if the substance of a citizens' proposed regulation *would* be preempted.

V. Section 790.33 Is Not Unconstitutionally Vague.

Plaintiffs claim that Section 790.33 is unconstitutionally vague, in violation of their due process rights. For the reasons discussed in Defendants' earlier briefing, that argument fails as a matter of law. DMSJ at 10-24; DOMSJ at 19-30.[6]

1. As a threshold matter, Florida's counties and municipalities have no due process rights. *See Dep't of Cmty. Affairs v. Holmes Cty.*, 668 So. 2d 1096, 1102 (Fla. 1st DCA 1996) ("Plaintiff Counties are not a 'person' entitled to protection under the due process clause of the federal or state constitution." (citations omitted)). Thus, as a matter of law, Section 790.33 cannot be unconstitutionally vague in its application to local governments. Accordingly, Plaintiffs' challenge is limited to the statute's application to individuals, and their challenge to Subsection 790.33(3)(e) is barred in its entirety, as the cause of action created by that provision may not be brought against individuals.

2. In their Opposition to Defendants' MSJ, Plaintiffs contest the applicable legal standard, pointing to the U.S. Supreme Court's holding in *Johnson v. United States* that a vague statute is "constitutional merely because there is some conduct that clearly falls within the provision's grasp." 135 S. Ct. 2551, 2560-61 (2015); *see*

[6] In neither their MSJ nor their Opposition to Defendants' MSJ, have Plaintiffs advanced their claim that Section 790.335, Florida Statutes is unconstitutionally vague. The Court should resolve that claim in favor of Defendants. *See* DMSJ at 20-22.

POMSJ at 34. Plaintiffs, however, misconstrue the import of *Johnson* and its progeny, which confirm that Section 790.33 is not unconstitutionally vague.[7]

Applying *Johnson*, the Florida Supreme Court explained in *Martin v. State* that a statute is unconstitutionally vague on its face only if it "contains no standard whatever by which criminality c[an] be ascertained." 259 So. 3d 733, 741 (Fla. 2018) (internal citation and quotation marks omitted). The challenger's burden is not merely to show that the statute is vague "in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard," but to show that the statute is vague "in the sense that *no standard of conduct is specified at all*." *Id.* (internal citation and quotation marks omitted; emphasis added).

Johnson's holding that a vague statute is "constitutional merely because there is some conduct that clearly falls within the provision's grasp," 135 S. Ct. at 2560-61, must be viewed in that context. Because a statute that contains "no standard" "is vague in all its applications," the fact that some conduct "clearly" falls within its scope will not save it. *Id.* at 2561. For example, the U.S. Supreme Court held that "a law prohibiting grocers from charging an 'unjust or unreasonable rate'" was void for vagueness, "even though charging someone a thousand dollars for a pound of sugar

[7] Plaintiffs also contend that their burden is lessened because Section 790.33 is a "penal" statute. *See* POMSJ at 34-35 & nn. 20-21. Defendants disagree with that characterization. *See* DOMSJ at 21 n.9. However, as discussed below, the statute is constitutional even under the standard applicable to criminal statutes.

would surely be unjust and unreasonable." *Id.* (citation and internal quotation marks omitted).

But even "clear rules" sometimes "produce close cases," and "[t]hat alone cannot render 'shapeless'" a statutory prohibition. *Salman v. United States*, 137 S. Ct. 420, 428 (2016). Accordingly, the Florida Supreme Court further explained in *Martin* that, "[t]o understand the proper scope of the void-for-vagueness doctrine, that doctrine must be viewed in conjunction with the rule of lenity." *Martin*, 259 So. 3d at 741. While a statute that prescribes "no standard of conduct" is unconstitutionally vague, on a lesser showing, courts must "construe, not condemn, [legislative] enactments," with "'ambiguity concerning the ambit of criminal statutes . . . resolved in favor of lenity.'" *Id.* (citation omitted). "Run-of-the-mill ambiguity regarding particular applications of a criminal statute therefore does not warrant application of the void-for-vagueness doctrine." *Id.*

Plaintiffs do not and cannot argue that Section 790.33 is wholly standardless, as required by *Martin*. The First DCA has explained that Subsection 790.33(3)(a) "clearly sets forth what is prohibited by law, which is the enactment or enforcement of firearms regulations." *Fla. Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, 461 (Fla. 1st DCA 2017). The statute further clarifies that the "regulation of firearms and ammunition" reserved to the Legislature "include[es] the purchase, sale, transfer,

taxation, manufacture, ownership, possession, storage, and transportation thereof." § 790.33(1), Fla. Stat.

Confronted with a statute that is clear in its application to the mine-run case, Plaintiffs identify discrete factual scenarios in which, Plaintiffs argue, the statute's application is ambiguous. Specifically, they question whether the statute prohibits local regulation of firearm "accessories" and "components," POMSJ at 39-40, and whether the statute prohibits local actions taken "in a proprietary capacity," *id.* at 38.

As explained in Defendants' earlier briefing and herein, there are clear answers to these questions (and other questions posed by Plaintiffs' Complaints and MSJ). Because a local ordinance restricting firearm "accessories" or "components" has both the purpose and effect of regulating the use and possession of firearms and ammunition, such an ordinance is the "regulation of firearms and ammunition" within the meaning of Section 790.33 and is therefore prohibited. *See* Section IX.D *infra*.[8] And because the statute prohibits only the "*regulation* of firearms and ammunition"—*i.e.*, actions taken in a *regulatory capacity*, the statute does *not*

[8] Plaintiffs contend that it is especially unclear whether local regulation of "bump stocks" is preempted, pointing to the ATF's earlier guidance that a bump stock is not a "machinegun" as that term is used in federal statutes and ATF's recent conclusion to the contrary. *See Guedes v. BATFE*, 920 F.3d 1, 37-38 (D.C. Cir. 2019). Whether a rifle stock is a firearm is a much closer question than whether *regulation* of rifle stocks is the *regulation* of firearms. The answer to the latter question is clear, for the reasons discussed above.

prohibit actions taken in a purely proprietary capacity (*i.e.*, as "private market participants"). *See* Section IX.A *infra*.[9]

Even if the court were to find the answers to these questions unclear, the questions would nevertheless fail to illustrate that the statute is wholly standardless, as Plaintiffs are required to prove under *Martin*. They present at most "[r]un-of-the-mill ambiguity regarding particular applications of a criminal statute therefore" do "not warrant application of the void-for-vagueness doctrine." *Martin*, 259 So. 3d at 741. In that circumstance, the only remedy is to "construe, not condemn" the statute, resolving ambiguity "in favor of lenity'" to a defendant who lacked fair notice that his conduct fell within its ambit. *Id.* at 741 (citation omitted).

3. Plaintiffs continue to advance an argument that Section 790.33 is unconstitutionally vague because Subsections 790.33(1) and (3)(a) preempt and prohibit local "regulations," "ordinances," and "rules" concerning firearms and ammunition, while the cause of action created by Subsection (3)(f) applies to those terms *and* "measure[s], directive[s], . . . enactment[s], order[s], or polic[ies]" that are

[9] Pointing to the Statement of Facts Plaintiffs submitted in support of their MSJ, which incorporates by reference hundreds of pages of exhibits, Plaintiffs accuse Defendants of "fail[ing] to address whether the many *other* legislative and regulatory actions Plaintiffs wish to take are preempted (and if so, why)." POMSJ at 38-39 (citing SOF ¶¶ 10-13; Pl. MSJ at 40-41). But Plaintiffs have not advanced any argument that the statute is unconstitutionally vague in its application to those actions. Defendants have addressed every scenario in which Plaintiffs have advanced such an argument and explained why Plaintiffs are mistaken.

"promulgated" by a local government. *See* PMSJ at 36-37; POMSJ at 37-38. The crux of Plaintiffs' argument is that "the additional language in subsection (3)(f) is different and far broader"; in their view, "measures," "directives," "enactments," "orders," and "policies" are "different actions" than "regulations," "ordinances," and "rules." PMSJ at 37. Plaintiffs cite dictionary definitions and other sources in support of their position that those terms are "not synonymous. PMSJ at 37-38.

Plaintiffs misapprehend Defendants' position. To be clear, Defendants agree that a "regulation is 'a rule or order issued by an executive authority or regulatory agency of a government and having the force of law.'" POMSJ at 38 (quoting Regulation, *Merriam-Webster Dictionary* (last visited May 8, 2019), *available at* https://www.merriam-webster.com/dictionary/regulation. And it is Defendants' position that the statute prohibits *only* the local regulation of firearms and ammunition, and nothing more. *See* Section IX.A *infra*.

Whether "policies," "measures," and "directives" may, in some other context, refer to governmental action broader than "regulations," "rules," and "orders," is beside the point. As used in the statute at issue, the terms are co-extensive because Section 790.33(3)(a) prohibits only local "ordinance[s]," "rule[s]," and "regulation[s]" that violate the statute's preemption, and the First DCA has held that Subsection 790.33(3)(f), which contains the additional terms of which Plaintiffs complain, cannot be read to create a cause of action for a broader range of conduct

than Subsection 790.33(3)(a) prohibits. *See Fla. Carry, Inc.*, 212 So. 3d at 463. Thus, the statute prohibits "policies," "measures," and "directives" only when they rise to the level of "regulation"—not when they are limited to actions in a local government's capacity as a proprietor or employer. *See* Section IX.A *infra*. Accordingly, consistent with *Martin*, the narrower construction of the statute is the proper resolution to this "[r]un-of-the-mill ambiguity." *Martin*, 259 So. 3d at 741.[10]

4. As discussed in Defendants' earlier briefing, *see* DMSJ at 10-11; DOMSJ at 23-24, Plaintiffs' vagueness challenge to Sections 790.33(3)(c), (d), and (e) is foreclosed for the additional reason that penalties under those provisions are available only in the event of a "knowing and willful" violation. The Supreme Court of the United States "has made clear that scienter requirements alleviate vagueness concerns," *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) (citations and internal quotation marks omitted), and a "'knowing and willful' scienter requirement" is more than sufficient to protect those without fair notice that their conduct falls within

[10] As discussed in Defendants' earlier briefing, the statute likewise does not apply to officials who vote against a preempted regulation (or who lack personal involvement in its enactment) or to a local government's defense of an official not yet found to have knowingly and willfully violated the statute. *See* DMSJ at 32-35; DOMSJ at 29-30. The answers to those questions, too, are clear. But even if they were not, the proper course is, again, to resolve them under the rule of lenity. *See Martin*, 259 So. 3d at 741.

the statute's proscriptions, *United States v. Hsu*, 364 F.3d 192, 197 (4th Cir. 2004) (citing *United States v. Lee*, 183 F.3d 1029, 1032-33 (9th Cir. 1999)).

As Plaintiffs note, the Florida Supreme Court has agreed. *See* POMSJ at 343-35. To be sure, the court held that a scienter requirement may not save a law from a vagueness challenge where the statute fails to forbid a "clear and definite act" and relies entirely on a scienter requirement to *define* the prohibited conduct. *See State v. Mark Marks, P.A.*, 698 So. 2d 533, 539 (Fla. 1997) ("It is not enough to say that a pre-suit statement filed by an attorney is 'incomplete' and thus violates the statute if it is filed with intent to defraud, deceive, or injure an insurer."). In other words, where a statute is standardless, *see Martin*, 259 So. 3d at 741, a scienter requirement will not save the statute by supplying an applicable legal standard.

As discussed above, however, the statute at issue is far from standardless. The Legislature defined the prohibited conduct—the enactment or enforcement of a preempted firearms regulation—without reference to the scienter requirement, the sole purpose of which is to determine whether certain penalties apply in the event of a violation.

VI. Section 790.33(3), Florida Statutes Does Not Unconstitutionally Impair Local Government Contracts.

A. Broward County's Claim

Broward County claims that certain provisions of Section 790.33 unconstitutionally impair its employment contract with County Administrator

Bertha Henry. *See* PMSJ at 41-43; *Counties* Compl. ¶¶ 71-76. Broward's claim fails because Section 790.33 does not impair any right enforceable under the contract. *See State ex rel. Simmons v. Harris*, 161 So. 374, 378-79 (Fla. 1935) (explaining that the Florida Constitution protects only the "*obligation* of contracts," *i.e.*, "the means provided by law by which [a contract] can be enforced" (discussing Art. I, § 10, Fla. Const.) (emphasis added)); *see* DMSJ at 43-50; DOMSJ at 31-36.[11]

1. As discussed above, "[t]he 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." *Weaver*, 245 So. 2d at 296; DOMSJ at 7 n.4; *see supra* pp. 6-7. Broward's claim fails at the threshold because it depends on the flawed premise that it can exempt certain aspects of its affairs (specifically, the terms of its relationship with an appointed official) from legislative prerogative by reducing them to a contract. "'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.'" *City of Charleston v. Pub. Serv. Comm'n of W. Virginia*, 57

[11] *See Sears, Roebuck & Co. v. Forbes*, 223 So. 3d 292, 299 (Fla. 4th DCA 2017) ("To impair a preexisting contract, a law must have the effect of rewriting antecedent contracts in a manner that chang[es] the substantive rights of the parties to existing contracts." (citation and internal quotation marks omitted)).

F.3d 385, 392 (4th Cir. 1995) (quoting *Hudson Cty. Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)).

2. Even if counties *could* contract away the State's power over their affairs, Broward's claim fails because it has identified no right enforceable among the parties to the agreement that is impaired by Section 790.33. Broward contends that Section 790.33(3)(e) impairs the contract because it "empowers a third party (the Governor) to remove Ms. Henry from office." *Counties* Compl. ¶¶ 77-78. But the agreement provides that Ms. Henry "serve[s] at the pleasure" of the County Commission, POMSJ at 42, and that she may "resign at any time from her position." DMSJ Ex. A (Broward-002499 at -002502). Either party may end the relationship at any time and, conversely, neither party has an enforceable right to continue the relationship. Section 790.33(3)(e) therefore interferes with no such "obligation," Art. I, § 10, Fla. Const.; *see R.A.M. of S. Fla., Inc. v. WCI Communities, Inc.*, 869 So. 2d 1210, 1219 n.3 (Fla. 2d DCA 2004) (holding that "there was no obligation of contract to impair" because the provision at issue was unenforceable).

Nor does the contract obligate Broward to provide any defense or indemnification prohibited by Section 790.33(3)(d). *See* POMSJ at 42. The contract expressly provides that both Broward and Ms. Henry "acknowledge and agree that even though BOARD *may* proceed to handle a claim . . . against ADMINSITRATOR, certain claims, actions, demands, losses and/or liabilities may

be precluded by law or may not be covered by the terms of this Article." DMSJ Ex. A (Broward-002499 at -002512) (emphasis added). "[T]herefore, the BOARD *reserves the right* to deny ADMINISTRATOR a defense, hold harmless, and/or indemnification and may assert its right to recover its costs and expenses, including attorney's fee, at a later date." *Id.* (emphasis added). Because Section 790.33(3)(d) "preclude[s] by law" the reimbursement or defense of officials who knowingly and willfully violate the statute, § 790.33(3)(d), Fla. Stat., the express terms of Ms. Henry's contract absolve the County of any contractual obligation to indemnify her should she do so.

Broward's response is that the phrase "precluded by law" refers to "laws in effect at the time of the making of the contract." POMSJ 44 n.25 (emphasis omitted). But the language of the agreement includes no such limitation. Likewise, the agreement provides that Broward "*may* proceed to handle a claim" against Ms. Henry and "the BOARD *reserves the right* to deny" a defense or indemnification, without limitation. DMSJ Ex. A (Broward-002499 at -002512) (emphases added).

Broward contends that this "clearly [is] not a standalone right to deny any and every defense" because that "would render the provision illusory." POMSJ 44 n.25. But a provision is not illusory merely because it does not anticipate enforcement. Contracts routinely include such provisions because it is important for parties to clarify not only what rights they will have under an agreement, but also what rights

they *will not* have. Here, the language is clear: "the BOARD reserves the right to deny ADMINISTRATOR a defense, hold harmless, and/or indemnification." DMSJ Ex. A (Broward-002499 at -002512) (emphasis added).

3. Broward further claims that the statute impairs the parties' contractual obligations because "removal by the Governor would obligate Broward County to pay severance benefits." *Counties* Compl. ¶ 77. Broward is mistaken. The contract requires severance if Ms. Henry is terminated "without cause" and provides that termination "for cause" does *not* obligate Broward to pay severance. DMSJ Ex. A (Broward-002499 at -002503). It is ambiguous whether the provision requires a severance payment in the event of termination by an official other than the County. If it does not, then by its plain terms, removal by the Governor would not obligate the County to pay severance. If it does, severance payment nevertheless is not required because violation of state law plainly constitutes "cause" under any reading of the contract, and the statute provides, moreover, that violation "shall be cause" for "removal from office by the Governor," § 790.33(3)(e), Fla. Stat. Thus, under either reading of the agreement, the statute does not impair the obligation to pay severance.

4. Even if the challenged provisions *did* modify the terms of Ms. Henry's contract (and they do not), they are not unconstitutional because any modification would be "reasonable and necessary to serve an important public purpose." *Scott v.*

Williams, 107 So. 3d 379, 385 (Fla. 2013) (citation omitted). The statute serves the important public purpose of enforcing the decades-old decision of Florida's duly elected representatives that the regulation of firearms and ammunition must be uniform across the State and therefore must be determined at the state level.

Any impairment of Broward's contractual expectations is, at most, *de minimis* because, as Broward concedes, the statute applies only if "Broward County enacts an offending ordinance and [Ms. Henry] complies with her obligation to implement the ordinance as enacted." *Counties* Compl. ¶ 77. Moreover, the challenged provisions penalize only a "knowing and willful" violation. § 790.33(3)(d)-(e), Fla. Stat. Those provisions thus subject Ms. Henry to penalties only in the speculative and remote circumstance that (1) Broward enacts a regulation in violation of Section 790.33, which predates the contract by more than 30 years, (2) Broward orders Ms. Henry to enforce that regulation, (3) Ms. Henry does so "knowing" that she is in violation of the statute, (4) enforcement proceedings are brought against her, and (5) the Governor exercises his discretion under the statute.

B. Leon County's Claim

Leon County's claim that Section 790.33 unconstitutionally impairs its contract with County Administrator Vincent S. Long must be rejected because Leon raises it for the first time in Plaintiffs' MSJ. "'[I]ssues that are not pled in a complaint cannot be considered by the trial court at a summary judgment hearing.'" *Saralegui*

v. Sacher, Zelman, Van Sant Paul, Beily, Hartman & Waldman, P.A., 19 So. 3d 1048, 1051 (Fla. 3d DCA 2009) (quoting *Fernandez v. Fla. Nat'l Coll., Inc.*, 925 So. 2d 1096, 1101 (Fla. 3d DCA 2006)).

Even though Leon was not a party to the counties' complaint when it was first filed, *see* Dkt. #22, No. 2018-CA-00882, it was under an obligation to comply with this Court's case management order. That order allowed the joinder of additional plaintiffs upon notice to defendants, "provided that any such addition of plaintiffs *does not effect any material change in the substance of the previously filed complaint in that Action*." Dkt. #31, ¶ 7, No. 2018-CA-00882 (emphasis added). An entirely new claim, especially one that necessarily turns on the specific provisions of a contract not disclosed in the operative complaint, effects a "material change" barred by the Court's order. *See* POMSJ at

Should the Court entertain Leon's claim, it fails on the merits for same reasons as Broward's claim. *See* POMSJ at 41 n.22 ("The substance of both Plaintiffs' and Defendants' arguments in their respective Motions are equally applicable to both Broward County and Leon County").

VII. Section 790.33(3)(b), Florida Statutes Does Not Usurp The Constitutional Authority Of The Courts.

The County Plaintiffs claim that Section 790.33(3)(b), Florida Statutes violates separation of powers because it provides that, "[i]f any county, city, town, or other local government violates this section, the court *shall* . . . issue a permanent

injunction against the local government." *See Counties* Compl. ¶ 95. Plaintiffs' argument fails because, as the Fourth District Court of Appeals has held, "[w]hen the Legislature creates a public duty and a corresponding right in its citizens to enforce the duty it has created, and provides explicitly that the remedy of vindication shall be an injunction," "the Legislature has not thereby encroached on judicial powers." *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191, 205 (Fla. 4th DCA 2001).

The Second and Third District Courts of Appeals have declined to rule on the constitutionality of such statutes, ruling instead that language "purport[ing] to dictate to such courts when, how or under what conditions injunctions should issue" must be construed as "a legislative declaration that a violation of the statutory mandate constitutes an irreparable public injury," one of the elements plaintiffs must otherwise prove to obtain an injunction. *Times Publ'g Co. v. Williams*, 222 So. 2d 470, 478 (Fla. 2d DCA 1969) (overruled in part on other grounds); *Harvey v. Wittenberg*, 384 So. 2d 940, 941 (Fla. 3d DCA 1980).

Plaintiffs' facial challenge to the constitutionality of Section 790.33(3)(b) fails as a matter of law under either approach. For that reason and because Plaintiffs have not sought declaratory judgment regarding the proper construction of Subsection (3)(b), this litigation presents no occasion for the Court to address the issue.

VIII. Section 790.33, Florida Statutes Is Not "Arbitrary And Irrational."

Plaintiffs contend that Section 790.33(3), Florida Statutes violates equal protection and due process rights because it penalizes local governments and their officials without a rational basis. *See Weston* Compl. ¶ 100; *Counties* Compl. ¶¶ 117-18; *see* POMSJ at 47 ("[T]his irrational distinction violates substantive due process principles.").

1. As discussed above, *see supra* Section V, Florida's counties and municipalities have no due process rights. *See Dep't of Cmty. Affairs v. Holmes Cty.*, 668 So. 2d 1096, 1102 (Fla. 1st DCA 1996) ("Plaintiff Counties are not a 'person' entitled to protection under the due process clause of the federal or state constitution." (citations omitted)). Local governments likewise have no equal protection rights. *See* Art. I, § 9, Fla. Const. ("All *natural persons*, female and male alike, are equal before the law." (emphasis added)); *Rogers v. Brockette*, 588 F.2d 1057, 1068-69 (5th Cir. 1979) (affirming that, while municipalities may have *standing* to sue the State, the U.S. Supreme Court has repeatedly held that "the Constitution does not interfere in states' internal political organization" through the Equal Protection Clause or the Due Process Clause). Plaintiffs' challenge is therefore limited to the statute's application to individuals.

2. The rational basis standard is "virtually insurmountable, because the burden of showing that the state action is without *any* rational basis is placed on the

individual assailing the classificatory scheme." *Sasso v. Ram Prop. Mgmt.*, 431 So. 2d 204, 217 (Fla. 1st DCA 1983), *aff'd*, 452 So. 2d 932 (Fla. 1984). "[A]s long as the classificatory scheme chosen by the legislature rationally advances a legitimate governmental objective, courts will disregard the methods used in achieving the objective, and the challenged enactment will be upheld." *Id.* at 216 (citations and footnote omitted) (emphasis in original). Section 790.33(3) easily meets that test because the State has a plainly legitimate interest in achieving statewide uniformity in the regulation of firearms and ammunition, and Section 790.33(3) advances that interest by "deter[ing] and prevent[ing]" such regulation at the local level. *See* § 790.33(2)(a); Fla. Stat.

Plaintiffs do not and cannot contend otherwise. Instead, they contend that the statute is irrational because it does not also advance the same interest in other contexts. Specifically, Plaintiffs object that "[o]ther preemption statutes cover the same areas but do not penalize local governments and elected officials in the same order of magnitude as do the Penalty Provisions." POMSJ at 48. That argument fails for two reasons.

First, the Legislature could rationally conclude that the State's interest in enforcing a uniformity requirement is especially great in the area of firearms and ammunition, which is uniquely poised at the intersection of public safety and citizens' constitutional rights. Plaintiffs contend that "the Preemption Law was

already accomplishing its goals without the need for the addition of the harsh penalties." POMSJ at 48. The Legislature concluded otherwise, determining that penalties were necessary going forward. Even applying *heightened* scrutiny, "courts must accord substantial deference to the predictive judgments of" legislatures, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (citation and internal quotation marks omitted), and under the rational basis test, "[t]he government need not prove the reason to a court's satisfaction," *Northside Sanitary Landfill, Inc. v. City of Indianapolis*, 902 F.2d 521, 522 (7th Cir. 1990). "[G]overnmental action passes the rational basis test if a sound reason may be hypothesized." *Id.*

The Legislature's prediction was, in any event, correct. Plaintiffs are more than 100 local governments and officials. In support of their argument that they have standing in this litigation, Plaintiffs have identified "proposed legislative, administrative, and policy actions, along with specific evidence that [they] would take those actions, "but for" the Penalty Provisions." POMSJ at 59. As discussed in Defendants' earlier briefing and herein, many of those proposed actions are preempted.

Second, rational basis review permits "policymakers [to] focus on their most pressing concerns." *Mance v. Sessions*, 880 F.3d 183, 191 (5th Cir. 2018) (quoting *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015) (footnotes and internal quotation marks omitted)). "The legislature may select one phase of one field and

apply a remedy there, neglecting the others." *State v. Peters*, 534 So. 2d 760, 763 (Fla. 3d DCA 1988) (citing *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955)). "It is [therefore] well established that a law" evaluated under rational basis review "is not constitutionally defective simply because it contains classifications which are underinclusive—that is, which do not include all who are similarly situated with respect to a rule, and thereby burden less than would be logical to achieve the intended government end." *Id.* (upholding statute regulating pit bulls, but not other dangerous breeds of dogs); *see*, *e.g.*, *Weaver v. MBM*, 936 So. 2d 732, 733 (Fla. 1st DCA 2006) (per curiam) (rejecting argument that "statutes impose stricter penalties on *claimants* accused of fraud than on *carriers* accused of fraud under section 440.105," and holding that the challenged classification "rationally advances the legitimate governmental objective of eliminating fraud" (emphases added)).

3. Plaintiffs' argument that the statute is irrational because "private property owners are permitted to pass and enforce 'rules' relating to firearms and ammunition on their property" but "local government property owners may not do so," *Weston* Compl. ¶ 101, fails for the same reason. The argument also fails because local governments and private citizens plainly are not similarly situated. Unlike local government regulations, whatever "rules" private citizens wish to enforce in their homes do not carry civil or criminal penalties. There can be no question the Legislature acted reasonably by preventing the creation of a patchwork firearms

regulatory regime while leaving private citizens free to exclude firearms from their homes if they wish.

4. Plaintiffs' contend that, when acting as landowners, counties and municipalities are "governed by the same laws and may exercise the same rights as a private corporation engaged in a similar undertaking." POMSJ at 51 (*City of Winter Park v. Montesi*, 448 So. 2d 1242, 1245 (Fla. 5th DCA 1984)). That argument fails because, as discussed above, the Florida Constitution "establishes the constitutional superiority of the Legislature's power over municipal power." *Masone*, 147 So. 3d at 494-95. To the same extent, "[t]he respective counties of this State do not possess any indicia of sovereignty; they are creatures of the legislature and accordingly are subject to the legislative prerogatives in the conduct of their affairs." *Weaver*, 245 So. 2d at 296 (internal citation omitted); *see* Art. VIII, § 1(f)-(g), Fla. Const; DOMSJ at 7 n.4.[12] Local governments' authority over their property is therefore subject to legislative enactments, such as Section 790.33. The Legislature simply does not have the same degree of control over private landowners.[13]

---

[12] As discussed below and in Defendants' earlier briefing, the statute does not preempt local government actions taken in a purely proprietary capacity. *See* Section IX.A *infra*; DMSJ at 55-56; DOMSJ at 38.

[13] Plaintiffs also contend that Subsections 790.33(3)(c) and (3)(e) are arbitrary because, on one reading of the statute, those provisions allow enforcement actions against not only local officials who vote *for* preempted regulations, but also officials who "may have actually voted against the enactment, but failed to convince his or her colleagues of the merits of the position." *Counties* Compl. ¶¶ 123-25; *see*

IX. Plaintiffs' Request For Declaratory Judgment That Certain Proposed Regulations Are Consistent With The Challenged Provisions.

In addition to their constitutional challenges, the County Plaintiffs seek a declaration that certain regulations they wish to enact and enforce are not preempted. *See* PMSJ at 44-50.

A. *Counties* Complaint Count VII

Article VIII, Section 5(b) of the Florida Constitution provides that "[e]ach county shall have the authority to require a criminal history records check and a 3 to 5-day waiting period, excluding weekends and legal holidays, in connection with the sale of any firearm occurring within such county."[14] The parties agree that Article

---

POMSJ at 49 & n.31. For the reasons discussed in Defendants' earlier briefing, the statute simply does not apply to those officials. DMSJ at 29-30; DOMSJ at 22-24. Should the Court disagree and find the statute vague in this respect, as Plaintiffs allege, *see* PMSJ at 39 n.20, the proper course would be to resolve any ambiguity "in favor of lenity" rather than declare the provisions unconstitutional, *Martin*, 259 So. 3d at 741.

[14] As discussed in Defendants' MSJ, the Counties' request for a declaration that they may require "the completion of criminal history records checks . . . *regardless of the location of the sale*," *Counties* Compl. ¶ 139 (emphasis added), must be denied. *See* DMSJ at 59 n.17. The Florida Constitution authorizes only criminal history records checks "in connection with the sale of any firearm *occurring within such county*," Art. VIII, § 5(b), Fla. Const. (emphasis added), and Section 790.33 preempts any local requirements that go further. Plaintiffs' argue that, because they must enforce Section 790.0655, Florida Statutes, which requires criminal history checks more broadly, they may enact parallel ordinances. *See* POMSJ at 53. That argument fails because Section 790.33 is a field preemption statute. *See infra* Section IX.C.

VIII, Section 5(b) has meaning only if counties can also *enforce* the requirements the provision authorizes. *See* DMSJ at 58-59; POMSJ at 51-53. And counties can do so only by requiring sellers to maintain certain documentation, specifically: "documentation of the date and hour of the firearm sale, the date and hour of the firearm transfer or receipt, the unique approval number obtained from the inquiry to the Department of Law Enforcement, and the serial number of the firearm at issue." *Counties* Compl. ¶ 139; PMSJ at 45.

Plaintiffs contend that Article VIII, Section 5(b) also implicitly authorizes counties to take *other* actions. But the courts "are not at liberty to add words to" a provision of the Florida Constitution that "were not placed there by the drafters." *Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 512 (Fla. 2008). As a narrow exception to that rule, Article VIII, Section 5(b) must be read to authorize ordinances requiring the documentation discussed above because they are "strictly necessary" in the sense that, absent such additional authorization, the provision "would be wholly illusory." *See* POMSJ at 52; DOMSJ at 36-37.

The same is not true of the other regulations Plaintiffs propose—"[r]equiring that all guns brought into gun shows are tagged" and "[l]imit[ing] the number of access doors at gun shows so that buyers and sellers have to enter and exit through an area where the background screening procedures can be monitored," *Counties* Compl. ¶ 139; PMSJ at 45. While those requirements may assist gun show

proprietors in monitoring vendor compliance, they would not provide *law enforcement* what they need to enforce the statute, in the context of gun shows or otherwise.[15] Documentation is necessary. And in light of a documentation requirement, further requirements are redundant and therefore unnecessary to give Article VIII, Section 5(b) meaning. Accordingly, the Florida Constitution does not authorize them. Plaintiffs' argument that "[t]he Legislature cannot abridge the Counties' constitutional Local Option power by statute," POMSJ at 52, fails because the Local Option provision does not authorize what the Counties seek to do.[16]

B. *Counties* Complaint Count VIII; *Weston* Complaint Count VI

The parties agree that Section 790.33 prohibits only the "*regulation* of firearms and ammunition"—*i.e.*, actions taken in a *regulatory capacity*. § 790.33(1), Fla. Stat. (emphasis added). The statute does not prohibit actions taken in a *purely* proprietary capacity (*i.e.*, as "private market participants"), such as "leasing and licensing the use of various properties," PMSJ at 47; *see* DOMSJ at 38, and

[15] To the extent Plaintiffs disagree, they have presented no evidence to support their position. Accordingly, they have failed to establish a genuine issue of material fact as to this issue, and Defendants are entitled to judgment as a matter of law.

[16] Ordinances requiring "posting of conspicuous signs" and "giving written notice to all dealers" that waiting periods and background checks are required, as well as "[i]nforming all gun show staff of the requirements," *Counties* Compl. ¶ 139; *see* PMSJ at 45, do not "regulate" firearms or ammunition within the meaning of Section 790.33 and therefore are not preempted.

"directing staff through policies, rules, directives, and the like," POMSJ at 48. Indeed, Section 790.33 expressly approves the latter. *See* § 790.33(4)(c), Fla. Stat. (providing that "any entity subject to the prohibitions of this section from regulating or prohibiting the carrying of firearms and ammunition by an employee of the entity during and in the course of the employee's official duties").

The parties further agree that regulations are "rule[s] or order[s] issued by an executive authority or regulatory agency of a government and having the force of law." POMSJ at 38 (Regulation, *Merriam-Webster Dictionary* (last visited May 8, 2019), *available at* https://www.merriam-webster.com/dictionary/regulation. Unlike actions taken purely in a local government's capacity as a landlord or employer, an ordinance barring citizens from carrying firearms "on any property or facility owned or operated by" Plaintiffs, *see Counties* Compl. Ex. A § 18-100; PMSJ at 48 (seeking "to restrict or prohibit firearms and ammunition from government-owned or government-operated properties and locations"), would satisfy that definition and thus violate Section 790.33.

Plaintiffs cite *Building and Construction Trades Council v. Associated Builders* for the proposition that, "where analogous private conduct would be permitted, th[e courts] will not infer such a restriction." POMSJ at 55-56 (citing 507 U.S. 218, 231-32 (1993)). That decision, however, confirms Defendants' reading of Section 790.33. The Court held that a federal statute preempted only state

"regulation" in a certain field and therefore did not prohibit the purely "proprietary" act of selecting a contractor in that field because the state was acting in its capacity as a "purchaser." 507 U.S. at 231-32. Defendants take the same position here.

C. *Counties* Complaint Count IX

Plaintiffs seek a declaration that they may "enact regulation precluding firearms . . . in certain areas specified in Section 790.06(12)(a), Florida Statutes, as statutory exceptions to permissible carrying of concealed weapons, including polling places, career centers, and any place of nuisance." *Counties* Compl. ¶ 156; PMSJ at 48-49. Plaintiffs' claim fails because Section 790.33 declares the Legislature's "occup[ation of] the *whole field* of regulation of firearms and ammunition." § 790.33(1), Fla. Stat. (emphasis added). Field preemption statutes reflect a legislative "decision to foreclose any [local] regulation in the area, even if parallel to [state] standards." *Cf. Arizona v. United States*, 567 U.S. 387, 401 (2012) ("Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards."). Such provisions "not only impose" state standards "but also confer a [state] right to be free from any other" regulation in the same field, including regulation that aligns with the State's. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481 (2018).

County and municipal police are free, indeed *required* to "enforce state firearms laws." § 790.33(2)(a), Fla. Stat; *see* POMSJ at 57. Plaintiffs therefore may

arrest those who violate Section 790.06(12)(a) by carrying firearms in the locations specified therein. But nothing in the statute authorizes Plaintiffs to "enforce the state firearms laws" *and* "adopt local regulation and ordinances that are consistent with" them. POMSJ at 57. Thus, for example, local police must enforce Section 790.222, which prohibits the possession, use, or sale of bump stocks, but local governments may not enact parallel ordinances that prohibit bump stocks and impose civil penalties. *See infra* Section IX.D.

Plaintiffs point to Section 790.33's catch-all exception for local ordinances authorized "by the State Constitution or general law," § 790.33(1), Fla. Stat.; *see also id.* § 790.33(2)(a), arguing that the exception has meaning only if Plaintiffs are free to enact ordinances parallel to state law. *See* POMSJ at 57 (arguing that "[a]ny other reading would nullify" the provision). Plaintiffs are mistaken. The provision ensures that the scope of the statute's preemption is consistent with the Florida Constitution and other Florida statutes, such as Article VIII, Section 5, discussed above. *See supra* Section IX.A.

Plaintiffs claim that the phrase "general law" refers to Section 125.01(1)(t), Florida Statutes, which generically provides that, "[t]o the extent not inconsistent with general or special law," counties may "[a]dopt ordinances and resolutions." *See* POMSJ at 58. By its plain text, that statute does not apply where an ordinance would

be "inconsistent with general or special law"—here, Section 790.33, which expressly preempts and prohibits local firearms regulations.

D. *Counties* Complaint Count X

Plaintiffs argue that Section 790.33 does not prohibit local regulation of firearms "accessories" such as large-capacity magazines because "[e]xpress preemption requires a specific legislative statement" and "cannot be implied or inferred." POMSJ at 57-58 (quoting *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010). Plaintiffs, however, ignore that the sole purpose and effect of the ordinances they seek to enact, such as bans on large capacity magazines and bump stocks, is to restrict "the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, [or] transportation" of firearms and ammunition. § 790.33(1), Fla. Stat. Accordingly, those ordinances are "regulation of firearms or ammunition"—precisely what Section 790.33(1) expressly prohibits—under any common-sense reading of the statute.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment for Defendants on all counts.

Respectfully submitted on this 8th day of May, 2019,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ Daniel W. Bell
DANIEL W. BELL (FBN 1008587)
Deputy Solicitor General
EDWARD M. WENGER (FBN 85568)
Chief Deputy Solicitor General
OFFICE OF THE ATTORNEY GENERAL
The Capitol, Pl-01
Tallahassee, Florida 32399-1050
(850) 414-3681
(850) 410-2672 (fax)
Daniel.Bell@myfloridalegal.com
Edward.Wenger@myfloridalegal.com

Counsel for the State of Florida, the Attorney General, the Commissioner of Agriculture, and the FDLE Commissioner

CERTIFICATE OF SERVICE

I hereby certify that the undersigned electronically filed the foregoing with the Clerk of the Courts on May 8, 2019, by using the E-Filing Portal, which will send a notice of electronic filing to all counsel of record.

/s/ Daniel W. Bell
Daniel W. Bell