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.
_____/

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 BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

ARGUMENT

I. There Is No Justiciable Case Or Controversy Because There Is No "Imminent Threat" Of Enforcement By Defendants.

1. As discussed more fully in Defendants' Motion to Dismiss,[1] the Florida courts have repeatedly held that declaratory judgment plaintiffs may not challenge the constitutionality of a statute absent an allegation that the plaintiffs face "an imminent threat" of enforcement by the defendant. *Tribune Co. v. Huffstetler*, 489 So. 2d 722, 724 (Fla. 1986); *Treasure Chest Poker, LLC v. Dep't of Bus. & Prof'l Regulation, Div. of Alcoholic Beverages & Tobacco*, 238 So. 3d 338, 341 (Fla. 2d DCA 2017); *El Faison Dorado, Inc. v. Hillsborough Cty.*, 483 So. 2d 518, 519-20 (Fla. 2d DCA 1986). Otherwise, the plaintiffs have asserted only "a speculative fear of harm that may possibly occur at some time in the indefinite future." *Treasure Chest Poker, LLC*, 238 So. 3d at 341 (quoting *State v. Fla. Consumer Action Network*, 830 So. 2d 148, 152 (Fla. 1st DCA 2002)).

"A party seeking an adjudication of the constitutionality of a statute and/or a declaratory judgment" may satisfy this standard by showing "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.*

[1] As used herein, the term "Defendants" refers to all defendants in these actions other than Governor Scott. The Governor is not a party to Defendants' Motion to Dismiss.

Martinez, 555 So. 2d 914, 915 (Fla. 1st DCA 1990) (emphasis added). A plaintiff may also satisfy this standard by showing that he has already violated the statute and is therefore subject to enforcement. S*ee Florida Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, 466 (Fla. 1st DCA 2017) (affirming dismissal of challenge to Section 790.33, Florida Statutes because there had been "no violation of section 790.33(3)(a) that has occurred in this case" and "there were also no penalties imposed"); *Dep't of Revenue v. Kuhnlein*, 646 So. 2d 717, 720 (Fla. 1994) ("The fact that these plaintiffs face penalties for failure to pay an allegedly unconstitutional tax is sufficient to create standing under Florida law.").

Whatever the metes and bounds of this standard may be, surely declaratory judgment plaintiffs fail to allege "an imminent threat" of enforcement by the defendants where, as here, the plaintiffs do not allege that they have violated the statutes at issue and none of the parties have been able to identify a single instance in which the defendants have enforced or threatened to enforce the statutes against the plaintiffs or anyone else.[2] To the extent Plaintiffs allege that private entities and

[2] Plaintiffs cite *Walker v. President of the Senate*, for the proposition that "a state official may be a proper defendant in a declaratory relief action even when that party has made no attempt to enforce the statute." Response at 40 (citing 658 So. 2d 1200, 1200 (5th DCA 1995) (internal quotation marks omitted). That decision does not address whether a plaintiff's claims are premature or may be brought absent an "imminent threat" of enforcement. Rather, *Walker* concerns a different doctrine—whether the plaintiff has named the proper defendant. Specifically, the court rejected the argument that an improper defendant, such as an individual legislator, becomes

individuals have threatened enforcement against them, they "ha[ve] sought relief against the wrong entity." *Treasure Chest Poker, LLC*, 238 So. 3d at 341; *see also Giuffre v. Edwards*, 226 So. 3d 1034, 1039 (Fla. 4th DCA 2017) (holding that a plaintiff lacks standing unless he establishes "a causal connection between the injury and the conduct complained of"). *Cf. 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); *Harrell v. Fla. Bar*, 608 F.3d 1241, 1257 (11th Cir. 2010) ("If the *enforcing authority* is defending the challenged law or rule in court, an intent to enforce the rule may be inferred." (emphasis added)).

This threshold requirement is, moreover, entirely consistent "with the purpose of the Declaratory Judgment Act." Response at 18. "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." *Martinez v. Scanlan*, 582 So. 2d 1167, 1170-71 (Fla. 1991). Constitutional questions require "a personal stake in the outcome of the controversy . . . to assure that concrete adverseness which

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a *proper* defendant merely because the official designated to enforce the challenged statute has not sought to enforce it.

sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *State v. Benitez*, 395 So. 2d 514, 517 (Fla. 1981) (citation and internal quotation marks omitted). Accordingly, "[i]t is a well established principle that the courts will not declare an act of the legislature unconstitutional unless its constitutionality is challenged directly by one who demonstrates that he is, or assuredly will be, affected adversely by it." *M.Z. v. State*, 747 So. 2d 978, 980 (Fla. 1st DCA 1999) (quoting *Henderson v. Antonacci*, 62 So. 2d 5, 8 (Fla. 1952)).

2. Plaintiffs contend that the cases cited in Defendants' Motion to Dismiss do not require an imminent threat of enforcement by Defendants as a prerequisite for standing. Response at 18. Plaintiffs are mistaken.

In *Tribune Co.*, the Florida Supreme Court held that "specifically, the constitutionality of a criminal 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." 489 So. 2d 722, 724 (Fla. 1986). Plaintiffs purport to distinguish *Tribune Co.* because the court also noted that the law did not "directly affect[]" the plaintiff. *Id.*; *see* Response at 18. In other words, Plaintiffs ask this Court to limit the rule announced by the Florida Supreme Court to the facts of the case because the case *could* have been decided on narrower grounds than it was.

Similarly, in *El Faison Dorado, Inc.*, the plaintiff organization challenged an ordinance prohibiting cockfighting and alleged that "[the Club] and its members could perhaps be subject to future arrests and convictions if they continue to engage in the sport of cockfighting." 483 So. 2d at 519. The court dismissed the proceeding because "the constitutionality of a criminal statute should be determined either in a proceeding wherein one is charged with violating the statute or in an action alleging an imminent threat of such a prosecution." *Id.* Nothing in the opinion indicates that the court reached its decision because, as Plaintiffs suggest, the club "likely could not be prosecuted under the statute." Response at 19. Rather, the plaintiff had "failed to establish its right to a declaratory judgment in these proceedings" because there was "no allegation and no evidence in the record that the Club, a corporation, has ever been threatened with prosecution under the ordinance in question." *El Faison Dorado, Inc.*, 483 So. 2d at 520.

Most recently, in *Treasure Chest Poker, LLC*, the Department of Business and Professional Regulation issued notices that the plaintiff's gambling activities were in violation of Florida law, and the plaintiff sought a declaratory judgment that its activities were lawful, alleging that the notices "placed [the plaintiff] and its customers in fear that they will be criminally or administratively prosecuted for engaging in activities that are, in fact, legal." 238 So. 3d at 340 (internal quotation marks omitted). The court explained that, "unless someone is charged with violating

the statute or prosecution is imminent, a declaratory judgment action to determine the construction or validity of a criminal statute lacks a justiciable controversy." *Id.* at 341. Because the department that had issued the notices was not charged with enforcing the criminal law, the notices were insufficient to "demonstrate that [the plaintiff] faced an imminent threat of prosecution." *Id.*

In *McGee*, a plaintiff sought a declaration that a statute was unconstitutional. 555 So. 2d at 914. The First DCA 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 allowed the case to proceed because a warrant for the plaintiff's arrest had issued. *Id.* at 915 (emphasis added).[3]

3. Plaintiffs have not identified a single Florida case that limits or abrogates the body of caselaw discussed above.

[3] In a variety of other contexts, too, the District Courts of Appeal have held that state action beyond the mere existence of challenged laws or rules (all that Plaintiffs have alleged here) is necessary to support a declaratory judgment action. For example, in *Grady v. Board of Cosmetology*, a plaintiff challenged the Board of Cosmetology's licensing and testing procedures, and the Third DCA held that the suit was not ripe because "the Board has neither tested appellant nor denied him a license." 402 So. 2d 338, 440 (Fla. 3d DCA 1981). Similarly, in *Florida Department of Agriculture. and Consumer Services v. Mendez*, the Fourth DCA held that takings claims are not ripe when the state has merely taken property by eminent domain; plaintiffs may file suit only after the state has actually denied just compensation, because "the legislature might well appropriate the full amounts of the awards in a statute directed at some form of payment." 98 So. 3d 604, 609 (Fla. 4th DCA 2012).

The Florida Supreme Court's decision in *Public Defender, Eleventh Judicial Circuit of Florida. v. State*, stands only for the unremarkable proposition that, "[g]enerally, standing 'requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings,'" and that "standing to bring or participate in a particular legal proceeding often depends on the nature of the interest asserted." 115 So. 3d 261, 282 (Fla. 2013) (internal citations omitted). That is entirely consistent with Defendants' position.

Plaintiffs characterize *Florida Carry, Inc. v. University of North Florida* as "finding [that a] student had standing to challenge [a] university regulation prohibiting firearms in vehicles on campus even though she had not violated the statute and did not face sanctions under it, but simply because she 'desire[d]' to carry a firearm while traveling to school which the regulation barred." Response at 16 (citing 133 So. 3d 966, 969 (Fla. 1st DCA 2013)). To the contrary, the court did not address any issue of standing, and noted *by way of background* that the plaintiff "desire[d]" to carry a firearm. *See Florida Carry, Inc.*, 133 So. 3d at 969. The court certainly did not hold that a plaintiff who "desires" to engage in prohibited conduct, without more, has standing to sue a defendant.

In *Stadnik v. Shell's City, Inc.*, the plaintiffs challenged a rule promulgated by the State Board of Health that provided for certain penalties. 140 So. 2d 871, 874 (Fla. 1962). The Florida Supreme Court held that the plaintiffs had standing because,

although they had not yet been threatened with enforcement, "[t]he promulgation of a rule of this type, by its very pronouncement by an agency of the government with apparent power to act, is sufficient to enable the party adversely affected to seek relief without awaiting actual prosecution or immediate threat thereof." *Id.* (emphases added). In other words, the Court identified an exception to the general rule and was willing to infer threatened enforcement (and therefore standing) because the enforcing authority had promulgated the rule in question. Plaintiffs here do not challenge such a rule.

X Corp. v. Y Person stands only for the familiar proposition that a plaintiff faced with an immediate choice that may result in litigation no matter the chosen course of action may seek a declaratory judgment because litigation is "unavoidable." 622 So. 2d 1098, 1101 (Fla. 2d DCA 1993). There, a company became aware that an employee was ill and, on one hand, faced a lawsuit by that employee if it were to transfer him "to another position to reduce the risk of transmission," and, on the other hand, faced a lawsuit "based upon its duty to prevent foreseeable injury to its other employees." *Id.* Likewise, in *Dickinson v. Buck*, a Florida statute and caselaw post-dating the enactment of that statute created irreconcilable rules both of which purported to govern the plaintiff's existing course of conduct, and the First DCA held that the case could proceed to resolve that conflict. 220 So. 2d 48 (Fla. 1st DCA 1969). Indeed, in both cases, the plaintiffs

were acting in violation of the rules they sought to reconcile, so unlike Plaintiffs here, they faced "imminent threat" of enforcement.

Florida's "ripening seeds of a controversy" doctrine, Response at 17 n.14, does not support Plaintiffs' argument; to the contrary, it confirms that they lack standing to sue Defendants because there is no imminent threat of enforcement by Defendants. The cases cited by Plaintiffs hold that plaintiffs have standing where they challenge "threatened future actions." *Dade Cty. v. Benenson*, 326 So. 2d 74, 75-76 (Fla. 3d DCA 1976) (holding that plaintiffs were entitled to seek relief from "threatened future actions," specifically, "present plans for development of the affected lands"); *see Platt v. Gen. Dev. Corp.*, 122 So. 2d 48, 50-51 (Fla. 2d DCA 1960) (holding that the suit could proceed because there was "threatened litigation in the immediate future"); *Fla. Consumer Action Network*, 830 So. 2d at 152 (explaining that, under the ripening seeds of a controversy doctrine, "an aggrieved party must nonetheless make some showing of a real threat of immediate injury").

4. Plaintiffs argue that, even if they lack standing, their claims may proceed "as a prudential matter," because "a plaintiff may challenge the constitutionality of a law even absent a live controversy where the claim raises issues of 'great public importance or [that] are likely to recur.'" Response at 19 (quoting *Holly v. Auld*, 450 So. 2d 217, 218 n.1 (Fla. 1984)). The prudential rule invoked by Plaintiffs is an exception to Florida's *mootness* doctrine. Plaintiffs identify no authority extending

that exception to Florida's *ripeness* and *standing* doctrines, which concern the very different threshold question of whether Plaintiffs have or had a live claim to begin with. Extending the prudential exception to those doctrines would eviscerate them, allowing any Floridian with a theoretical interest in a constitutional question to bring suit so long as the issue is sufficiently important to the public at large. But, under established caselaw discussed above, constitutional questions require "a personal stake in the outcome of the controversy . . . to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Benitez*, 395 So. 2d at 517 (citation and internal quotation marks omitted).

II. The *Weston* and *Miami-Dade County* Plaintiffs Lack Standing Because They Allege "Merely The Possibility" That They Will Enact Local Regulation Within The Scope Of Section 790.33, Florida Statutes.

The *Weston* Plaintiffs allege only that specific measures relating to firearms "have been *discussed* by Plaintiffs" and that "[t]he governing body for each of the [*Weston*] 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." *Weston* Am. Compl. ¶ 36, 11 (emphases added). 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 there are "definitive regulatory measures that *some* of Miami-Dade County's Elected Officials desire to adopt." *County* Am. Compl. ¶¶ 16-19 (emphases added).

The problem is not that the *Weston* and *Miami-Dade County* Plaintiffs fail to "specifically allege concrete legislative action" they are interested in considering, Response at 20, but that they allege only that they would *consider* such legislation, not that they would *enact* it. However specific the proposed legislation may be, allegations that Plaintiffs would "consider" that legislation or that it has piqued the interest of "some" officials within a given jurisdiction leaves the court to speculate whether Plaintiffs would actually take the steps necessary to enact such legislation and thereby subject themselves to potential enforcement under Section 790.33. The injury alleged by the *Weston* and *Miami-Dade County* Plaintiffs is therefore even more speculative than the injury alleged by the other Plaintiffs, as discussed above. Because they allege "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), their claims must be dismissed. *See also*, *e.g.*, *M.Z.*, 747 So. 2d at 980-81 (holding that a juvenile defendant who had been charged as an adult could challenge adult sanctions only "if and when he is ever actually subjected to adult sanctions," as the present challenge "rests entirely upon contingencies which have not yet occurred").

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

1. The District Courts of Appeal have repeatedly held 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 v. Alachua Cty.*, 65 So. 3d 577, 578, 579 (Fla. 1st DCA 2011) (emphasis added) (quashing denial of motion to dismiss).[4] That is because, when the defendant has "no enforcement authority over the statute" at issue, the defendant is not the cause of the alleged injury and "there is no relief the court could order [the defendant] to provide to remedy the constitutional violation alleged in the complaint." *Francati*, 214 So. 3d at 747; *see also Giuffre*, 226 So. 3d at 1039 (holding that a plaintiff lacks standing unless he establishes "a causal connection between the injury and the conduct complained of" and "a substantial likelihood that the requested relief will remedy the alleged injury in fact"); *Pandya v. Israel*, 761 So. 2d 454, 4567 (Fla. 4th DCA 2000) (holding that a plaintiff has "standing to seek declaratory relief" only when he has suffered "an injury in fact for which relief is likely to redress"). In other words,

[4] *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*, 238 So. 3d at 341 (holding that "the Department is not the entity charged with enforcing chapter 849," so plaintiff "has sought relief against the wrong entity"); *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).

where, as here, the injury alleged by the plaintiffs is that their conduct is "chilled" by a statutory enforcement provision, Response at 9, their claims may be brought only against one who is charged with enforcing that provision, because an order against any other person would not "remedy the constitutional violation alleged in the complaint" and would therefore be an impermissible advisory opinion. *Francati*, 214 So. 3d at 747.

For precisely that reason, the First DCA recently explained that "[i]t is absurd to conclude" that an official's "general executive duty to execute and enforce the laws" "is sufficient to make him a proper defendant." *Id.* at 746, 747.[5] To be sure,

[5] *Atwater*, 64 So. 3d at 703-04, is not to the contrary. There, the court held that the named defendants were not proper parties and remarked that "the Secretary of Community Affairs *appears* to be the responsible official, as the Department of Community Affairs is the state land planning agency." *Id.* at 704 (emphasis added). That statement is not a holding; indeed, it is not even dicta. It is a mere observation about what "appear[ed]" to be the answer to a question that was neither before the court nor supported by any analysis of the issue. Moreover, in *Atwater*, the plaintiffs challenged an entire chapter of the Florida Statutes on the ground that its enactment was unconstitutional because it covered more than one subject. The challenge did not specifically concern any enforcement provision of the chapter at issue. The Department of Community Affairs was charged with administering the chapter at issue, so its specific duties would be affected by the litigation.

Brenner v. Scott, too, is not to the contrary. There, the court addressed a different issue—Eleventh Amendment immunity—and applied a lower standard than that applied by the Florida courts, requiring only that a defendant have "some connection" with the challenge. 999 F. Supp. 2d 1278, 1285 (N.D. Fla. 2014). Moreover, the court merely found the Surgeon General a proper defendant because the plaintiff sought "to change a death certificate's marital information." *Id.* The Surgeon General had such authority and therefore could redress the alleged injury. *Id.*

not every constitutional challenge concerns a statutory enforcement provision. Statutes provide for a wide variety of other state action, and a suit against an official with a concrete role in that action is proper because, if successful, it will remedy the injury alleged by the plaintiff. *See*, *e.g.*, *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 403 (Fla. 1996) (holding that the Governor and Legislature were proper parties "because of the nature of the action," which alleged that they had failed to adequately fund the public education system). The courts have therefore explained that plaintiffs may sue an official if their challenge "implicat[es] *specific responsibilities* of the state official" and "the state official has an actual, cognizable interest in the challenged action." *Francati*, 214 So. 3d at 746 (emphasis added). Because these actions involve no "specific responsibilities" or "actual, cognizable interest" of the named officials, Defendants should be dismissed as improper parties. *Id.* at 746.

2. Defendants are not "designated" to enforce Section 790.33. *See Marcus v. State Senate for the State*, 115 So. 3d 448, 448 (Fla. 1st DCA 2013) (holding that the Florida Senate and House of Representatives were "improper defendants" because neither "has been designated as the enforcing authority of 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. Subsection (3)(f) "creat[es] a private cause of action," for plaintiffs "adversely affected" by a violation of the statute and allows them to seek "declaratory and injunctive relief as well as actual damages up to $100,000" against local governments. *Id.* (quoting *Dougan v. Bradshaw*, 198 So. 3d 878, 881 (Fla. 4th DCA 2016) (emphasis added)). Plaintiffs bringing such a suit 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," "[i]f the court determines that a violation was knowing and willful." § 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).

In sum, Section 790.33 expressly vests enforcement authority in private citizens and organizations who are adversely affected by violations of the statute, creating a system of private attorneys general. That enforcement authority is not vested in any state official. *See State, By & Through State Attorney For Twelfth Judicial Circuit v. Gen. Dev. Corp.*, 448 So. 2d 1074, 1080-81 (Fla. 2d DCA 1984), *approved sub. nom.* 469 So. 2d 1381 (Fla. 1985) (holding that State Attorney lacked authority to enforce a statutory cause of action because the Legislature gave another Department authority to enforce the statute at issue). The statute also charges the Governor (and no other state official) with authority to enforce one subsection. Accordingly, Defendants are improperly named in these actions and therefore must

be dismissed. *See*, *e.g.*, *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 958, 962-63 (8th Cir. 2015) (dismissing action against state official because the challenged statute "provides for enforcement only through private actions for damages").[6]

3. Plaintiffs suggest that one of the defendants in this case must be properly before the court because, they argue, an action seeking civil fines pursuant to Section 790.33(3)(c) "must necessarily be brought by a government official." Response at 30. Specifically, Plaintiffs contend that civil fines may be imposed only against individual persons and subsection (3)(f) creates a private cause of action only against local governments themselves, not officials. Response at 29-30. Plaintiffs are incorrect.

Section 790.33(3)(f) allows a person or organization "adversely affected" by a violation of the preemption statute to "file suit against any . . . [local government] entity . . . for declaratory and injunctive relief and for actual damages."

[6] *See also Okpalobi v. Foster*, 244 F.3d 405, 422 (5th Cir. 2001) (en banc) (dismissing challenge to "a purely private tort statute, which can be invoked only by private litigants," because the suit was brought against state officials); *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999) (dismissing challenge to "*private* civil enforcement provision" because defendant state officials were improper defendants); *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.").

§ 790.33(3)(f), Fla. Stat. In other words, the statute "creates a private cause of action," *Dougan v. Bradshaw*, 198 So. 3d 878, 881 (4th DCA 2016), but limits suits seeking *particular remedies*—"declaratory and injunctive relief and . . . actual damages"—to just suits against local government entities, "precluding *those remedies* as to individuals," *Fla. Carry, Inc. v. Thrasher*, 248 So. 3d 253, 261 (1st DCA 2018) (emphasis added); *see Fla. Carry, Inc. v. Univ. of Fla.*, 180 So. 3d 137, 150 (1st DCA 2015) ("[W]e agree with the trial court's determination that damages under the statute may not be awarded against an individual.").

Nothing in the statute prohibits "adversely affected" parties who file such a suit from also naming individual officials as defendants and seeking statutory fines against them pursuant to Section 790.33(c), and no court has held otherwise. To the contrary, the First DCA has rejected the argument that "there is no statutory provision that creates a private right of action against . . . individual defendants for fines," Appellees' Answer Brief, *Fla. Carry, Inc. v. Thrasher*, No. 1D16-3423, 2017 WL 3926552 at *6 (Fla. 1st DCA 2017), explaining that subsections (3)(c) and (3)(f) both "create[] potential causes of action for affected parties," *Thrasher*, 248 So. 3d at 258. The court rejected fines against the defendant officials only because they had not acted willfully. *Id.* at 261.

Moreover, the First DCA reached its conclusion that subsection (3)(f) does not allow damages against officials by contrasting the text of that that provision,

which allows declaratory and injunctive relief and damages against "any county, agency, municipality, district, or other entity," with the text of subsection (3)(c), which allows civil fines only against "officials." *See Fla. Carry, Inc.*, 180 So. 3d at 150-51. There is no similar conflict between subsection (3)(c) and the language of subsection (3)(f) that creates a private right of action—that anyone "adversely affected" by a violation of the statute "may file suit." Subsection (3)(c) is silent as to who may seek to impose such fines, providing only that, "*[i]f the court* determines that a violation was knowing and willful, *the court* shall assess a civil fine of up to $5,000 against the elected or appointed local government official." § 790.33(3)(c), Fla. Stat. (emphases added). Subsection (3)(c) presupposes litigation before "the court," and the most natural reading of that language is that it refers to the only "court" contemplated by the statute—the court invoked by private plaintiffs pursuant to subsection (3)(f). *See id.* § 790.33(3)(f) (allowing suit "in any court of this state having jurisdiction over any defendant to the suit").

Other provisions of Chapter 790 make clear, moreover, that when the Legislature intends that a state official enforce civil fines under that Chapter, the Legislature says so. *See id.* § 790.335(4)(c) ("The Attorney General may bring a civil cause of action to enforce the fines assessed under this paragraph.");[7] *id.*

[7] Because Section 790.335(4)(c) expressly charges the Attorney General with authority to bring a civil action to enforce certain violations of the statute, she may, in an appropriate case, properly be named as a defendant in a challenge to Section

§ 790.251(6) ("If there is reasonable cause to believe that the aggrieved person's rights under this act have been violated by a public or private employer, the Attorney General shall commence a civil or administrative action for damages, injunctive relief and civil penalties."); *see also Gen. Dev. Corp.*, 448 So. 2d at 1080 (explaining that the State Attorney's lack of enforcement authority was "evidenced by the legislature's enactment of over twenty specific general laws that have explicitly given a state attorney the authority to independently initiate civil suits on behalf of the state in other areas").

That the statute contemplates exclusively private enforcement is reinforced by the fact that Plaintiffs do not allege that any of the defendants in this case has ever attempted or threatened to enforce the statute against Plaintiffs or anyone else. Defendants identified that issue in their Motion to Dismiss, and in their Response, Plaintiffs still have not identified a single instance of threatened or attempted enforcement by a state official, much less by Defendants. Instead, Plaintiffs have identified a number of threatened or actual enforcement actions brought by private plaintiffs, Response at 13-14 & nn. 10-11, serving only to underscore that the statute

790.335(4)(c). This is not such a case because, as explained above, Plaintiffs do not allege that there is an imminent threat that the Attorney General will enforce that statute against them. Moreover, because no other official is charged with enforcing Section 790.335(4)(c), the other defendants must be dismissed as to the claims challenging that statute.

creates a private enforcement regime, with the exception of a provision allowing possible removal by the Governor. *See*, *e.g.*, *Treasure Chest Poker, LLC*, 238 So. 3d at 341; *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 438 (6th Cir. 2000).

Finally, even if one of the defendants in this case had authority to impose civil fines under Section 790.33(3)(c), only *that* defendant would be properly before the Court. Moreover, such authority would supply a basis only to challenge subsection (3)(c), because it would not supply the requisite "concrete adverseness which sharpens the presentation of issues" with respect to the other provisions of the statute, for example, the private right of action created by subsection (3)(f). *Benitez*, 395 So. 2d at 517.

4. Plaintiffs contend that, if there is no state official charged with enforcing Section 790.33, there must nevertheless be a state official Plaintiffs can sue to challenge the statute because, otherwise, "accepting Defendants' argument would effectively insulate the Penalty Provisions from legal challenge." *See* Response at 39-40, 26. That is incorrect for two reasons.

First, there is no authority for the proposition that there must be a state official available to defend every constitutional challenge. *See Martinez*, 582 So. 2d at 1170-71 ("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."). To the contrary, the Florida courts have routinely dismissed entire cases because the named defendants were not charged with enforcing the statute at issue. *See Francati*, 214 So. 3d at 747 (ordering the circuit court to dismiss the case because the Governor, the only defendant, was an improper party); *Atwater*, 64 So. 3d at 703 (ordering the Circuit Court to "dismiss all the defendants from the declaratory action because they are not proper parties"); *Fla. Consumer Action Network*, 830 So. 2d at 153 (reversing and remanding with instructions to dismiss with prejudice where state was only named defendant); *Walker*, 658 So. 2d at 1200 (affirming dismissal of all defendants); *Treasure Chest Poker, LLC*, 238 So. 3d at 341. In those cases, the courts have not, as Plaintiffs suggest, identified another, proper defendant and added it as a substitute party. *See* Response at 26.

Second, Plaintiffs identify in their Response a number of threatened or actual enforcement actions brought against local governments and their officials by private parties. *See* Response at 13-14 & nn. 10-11. In any of those cases, the local government or official is free to challenge the constitutionality of the statute defensively, or by way of a declaratory judgment action against the private party threatening to sue. Because the questions presented are pure issues of law, a decision in any one case would create precedent that would determine all other actions seeking to enforce the statute.

5. In sum, because the injury alleged by Plaintiffs is that their conduct is "chilled" by a statutory enforcement provision, Response at 9, and Defendants are not charged with enforcing that provision, there is no order the Court could enter in these actions that would "remedy the constitutional violation alleged in the complaint." *Francati*, 214 So. 3d at 747. Accordingly, Defendants are improperly named in these actions and must therefore be dismissed. Plaintiffs' additional arguments with respect to each Defendant are unpersuasive:

i. The Attorney General

First, Plaintiffs claim that the Attorney General is a proper defendant because she is designated to enforce certain provisions of Chapter 790, Florida Statutes, other than Section 790.33, the actual provision at issue. Specifically, the Attorney General is authorized to enforce Section 790.335(4)(c), which prohibits the registry and listing of firearm owners, and Section 790.251(6), which protects the right to keep and bear arms in a vehicle for self-defense. Plaintiffs argue that those provisions give the Attorney General a stake in Section 790.33 as well, because "[a] violation of either of those provisions would" also be preempted by Section 790.33. Response at 31. This argument fails because, regardless of whether the statutes apply to some of the same conduct, the applicability of each statute is wholly independent of the other. In other words, if the Court were to strike Section 790.33 in its entirety, that decision

would have no impact on the Attorney General's authority to enforce Sections 790.335 and 790.251.

Second, Plaintiffs argue that the Attorney General is a proper defendant because she "has the right and authority to defend the constitutionality of state laws and, in fact, has intervened in at least one prior legal proceeding to defend the validity of the Penalty Provisions." Response at 33. It is well-established, however, that the Attorney General's decision to defend the constitutionality of a state law is committed exclusively to "h[er] sound official discretion." *Bondi v. Tucker*, 93 So. 3d 1106, 1109 (Fla. 1st DCA 2012) (citation and internal quotation marks omitted). An order requiring the Attorney General to participate in this case merely because she participated in another, different case would eviscerate her discretion and give rise to serious separation of powers concerns. As the Florida Supreme Court has explained, the Attorney General's exercise of her discretion "can not be challenged or adjudicated," *id.* (citation omitted), because it is exercised "independently of the courts," and assessment of the Attorney General's decision to participate in litigation is reserved for "another tribunal, the people," *State ex rel. Landis v. S. H. Kress & Co.*, 155 So. 823, 826, 828 (Fla. 1934), *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). Thus, while "the Attorney General [has] the *discretion* to participate and be heard in a particular case," that authority "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) (emphases added).

In other words, every case involves a unique balance of considerations, and the fact that the Attorney General chose to participate as a non-defendant in a different case does not mean that she may be compelled to participate as a defendant in these cases. Consistent with her position in this case, the Attorney General has previously argued—successfully before this court—that she is an improper defendant in an action challenging Section 790.33. *See Marcus v. Scott*, No. 2012-CA-001260, 2012 WL 5962383, at *3 (Fla. 2d. Cir. Oct. 26, 2012). As explained in Defendants' Motion to Dismiss, the Attorney General has also intervened in litigation concerning Section 790.33, but that litigation 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. 2014). 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.

Moreover, the Attorney General's expressed view that Section 790.33 is constitutional does not change the fact that the statute, and thus a challenge to the statute, implicates no "specific responsibilities" of her office. *Scott*, 214 So. 3d at 746. In other words, there is no causal connection between the Attorney General and the injuries alleged by Plaintiffs, so she is an improper defendant in these actions. *See Francati*, 214 So. 3d at 747.

ii. The Commissioner of Agriculture and the FDLE Commissioner

Plaintiffs argue that, in their view, like the Attorney General, the Commissioner of Agriculture and the FDLE Commissioner are proper defendants because they are charged with enforcing provisions of Chapter 790, Florida Statutes *other than* Section 790.33, the actual provision at issue. Response at 35-37. For the reasons discussed above, that argument fails.

With respect to the Commissioner of Agriculture, the *Weston* Plaintiffs also argue that, because they "challenged the substantive validity of the State's preemption of firearms and ammunition with respect to the presence of firearms in or on property owned by a municipality," their claims, if successful, would affect the Commissioner's "performance of his duties in the approval and administration of concealed weapons permits." Response at 35. To the contrary, if the preemption

statute were declared invalid and local governments were to restrict the presence of firearms on their property, that would affect only permit-holders' rights, not the Commissioner's "approval and administration of concealed weapons permits." *Id.*

Plaintiffs also argue that the FDLE Commissioner is a proper defendant because the Department's duties include "investigat[ing] the misconduct, in connection with their official duties, of public officials and employees and of members of public corporations and authorities subject to suspension or removal by the Governor." Response at 36-37. FDLE must conduct such an investigation, however, only on "specific direction by the Governor in writing to the executive director," § 943.03(2), Fla. Stat. That FDLE will ever conduct such an investigation is therefore entirely speculative and cannot render the Commissioner a proper defendant in these actions. *See Fla. Consumer Action Network*, 830 So. 2d at 152.[8]

iii. The Auditor General

Plaintiffs contend that the Auditor General is a proper defendant because she is responsible for "ensuring that public funds" are not used "to defend or reimburse officials for expenses incurred in defending an alleged violation of subsection

[8] Should the Court disagree, the FDLE Commissioner would be a proper defendant only insofar as Plaintiffs challenge Section 790.33(3)(e), which provides for possible removal of officials by the Governor. No other aspect of Section 790.33 even arguably bears on the "specific responsibilities" of the Commissioner.

790.33(3)(a)," which is prohibited by subsection (3)(d). Response at 36. That is incorrect.

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 her 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.

To be sure, the Auditor General may, in the course of conducting an otherwise routine audit, identify illegal conduct by state or local officials, and she may report that illegal conduct to other officials, such as the Legislature. That possibility, however, does not distinguish the Auditor General from every other Floridian, any of whom may become aware of illegal conduct and report it to authorities. That possibility is also 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.[9]

[9] Should the Court disagree, the Auditor General would be a proper defendant only insofar as Plaintiffs challenge Section 790.33(3)(d), which concerns the use of public funds. No other aspect of Section 790.33 even arguably bears on the "specific responsibilities" of the Auditor General.

iv. The Broward County State Attorney

The *Daley* Plaintiffs contend that the Broward County State Attorney is a proper defendant because he is charged with prosecuting Florida's criminal laws and, in the view of the *Daley* Plaintiffs, Section 790.33 falls within Chapter 790 and is therefore part of Florida's criminal code. Response at 37-38. As discussed in Defendants Motion to Dismiss, the State Attorney has no authority to "prosecute" violations of Section 790.33, because the statute's enforcement provisions are exclusively civil, not criminal. *See* Motion at 33-34.

The *Daley* Plaintiffs also suggest that the State Attorney has authority to "pursue civil violations on behalf of the State." Response at 38 n.25. To the contrary, the courts have made clear that the State Attorney does not have authority to enforce a statutory cause of action where, as here, the statute provides for alternative enforcement. *See Gen. Dev. Corp.*, 448 So. 2d at 1081. Plaintiffs cite an opinion issued by the Office of the Attorney General, but that opinion stands only for the proposition that the state attorney may have authority to enforce a statute where, unlike here, he has historically enforced that statute and the statute is silent as to alternative enforcement. *See* 91 Op. Att'y Gen. 38 (Fla. A.G. 1991).[10]

[10] As discussed in Defendants' Motion to Dismiss, the *County* Plaintiffs also challenge Section 790.335(4)(a), a criminal statute the State Attorney is designated to enforce. The *County* Plaintiffs do not name the State Attorney as a defendant, and they do not allege that any named defendant bears any relationship to the State Attorneys' enforcement of Section 790.335(4)(a), so their challenges against that

v. The Broward County Sheriff

The *Daley* Plaintiffs contend that the Broward County Sheriff is a proper defendant because "the enforcement and collection of any applicable fine would . . . require action by a public official" and "[t]he sheriff is that public official." Response at 38 n.27. That generic authority, however, involves enforcement of a *court order*, *see* § 790.33(c)(3), Fla. Stat. (providing that "the court shall assess a civil fine"), not the underlying statute, which, as discussed more fully above, is enforced by private right of action. Because the Sheriff's duty to enforce court orders applies without regard to the subject of the underlying lawsuit and bears no relationship to whatever provision of law gave rise to such lawsuit, that duty establishes no connection whatsoever between the Sheriff and any substantive provision of law, including Section 790.33. If the Sheriff were nevertheless required to defend these actions, he may be required to do so 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).[11]

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provision must be dismissed. Only the *Daley* plaintiffs name the State Attorney as a defendant, and they do not challenge Section 790.335(4)(a).

[11] Should the Court disagree, the Sheriff would be a proper defendant only insofar as Plaintiffs challenge Section 790.33(3)(c), which provides for the civil fines Plaintiffs allege the Sheriff would have to collect. No other aspect of Section 790.33 even arguably bears on the "specific responsibilities" of the Sheriff.

vi. The State of Florida

Plaintiffs argue that the State is a proper defendant because the challenged provisions chill Plaintiffs' conduct "simply by being on the books—an action taken by the State." Response at 38. Plaintiffs identify no Florida case that supports that proposition, and Defendants have found none. Although the State, acting through the Attorney General, has discretion to appear in an otherwise justiciable case or controversy to defend the constitutionality of a state statute, that discretion does not create "the antagonistic interest necessary for the exercise of the court's declaratory-relief jurisdiction." *Fla. Consumer Action Network*, 830 So. 2d at 153; *see also* Motion to Dismiss at 21-22.

Plaintiffs contend that where the State has been dismissed as an improper defendant, the courts have done so only because another state official remained to defend the lawsuit. That is simply incorrect. In at least one case, the First DCA has reversed and remanded with instructions to dismiss because the State, the only defendant in the case, was an improper defendant. *See Fla. Consumer Action Network*, 830 So. 2d at 153. In another case, the First DCA ordered this Court to dismiss the only remaining defendant, the Governor, after this Court had already dismissed the State. *See*, *e.g.*, *Francati*, 214 So. 3d at 747. Moreover, in none of the many cases in which the courts have dismissed state officials as improper defendants have the courts reasoned that the State would be available as a defendant or required

its joinder. *Atwater*, 64 So. 3d at 703; *Walker*, 658 So. 2d at 1200; *Treasure Chest Poker, LLC*, 238 So. 3d at 341; *see also* p. 17 & n.6, *supra*.

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

Under Florida law, state and local officials 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." *Crossings at Fleming Island Cmty. Dev. Dist. v. Echeverri*, 991 So. 2d 793, 803 (Fla. 2008) (internal quotation marks omitted). This rule applies not only to statutes officials "are responsible for enforcing or administering," Response at 21, but also to statutes "affecting their duties," *Echeverri*, 991 So. 2d at 803; *see id.* (explaining "the common law principle" that public officials "lack standing to challenge the constitutionality of a statute"); *see*, *e.g.*, *Dep't of Educ. v. Lewis*, 416 So. 2d 455, 458 (Fla. 1982) (applying the doctrine to officials' challenge to appropriations legislation restricting funding to their departments). There can be no question that Sections 790.33 and Section 790.335 "affect" the duties of local officials by restricting the range of regulations that they may enact and enforce. That is indeed the basis of these lawsuits. Thus, local officials are barred from challenging the statutes at issue.

Plaintiffs invoke an exception that allows "a public official [who] is willing to perform his duties, but is prevented from doing so by others," to challenge state action. Response at 22 (quoting *Coal. for Adequacy & Fairness in Sch. Funding, Inc.*, 680 So. 2d at 403 n.4). That exception, however, does not allow public officials to challenge statutes affecting their duties. If it did, the exception would swallow the rule. In *Chiles*, the court held that the plaintiff school boards had standing because they challenged inadequate education funding that "allegedly prevented [them] from carrying out their statutory duties." 680 So. 2d 403 n.4. Nothing in that case suggests the school boards had standing to challenge the statutes themselves. *See Reid v. Kirk*, 257 So. 2d 3, 4 (Fla. 1972) (explaining that the plaintiff had standing because he was "willing to perform his duties, but is prevented from doing so by others," and distinguishing earlier cases because the plaintiff in *Reid* was "*not challenging the validity of statutes applicable to him*" (emphasis added)).

Plaintiffs also invoke an exception that allows "a ministerial officer" to challenge a statute if "he will be injured in his person, property, or rights by its enforcement." *Dep't of Agric. & Consumer Servs. v. Miami-Dade Cty.*, 790 So. 2d 555, 558 (Fla. 3d DCA. 2001); *see* Response at 22. As explained in Defendants' Motion to Dismiss, that exception may be raised only in a defensive posture, as the courts have made clear 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.'" *Dep't of Agric. & Consumer Servs.*, 790 So. 2d at 558 (emphasis in original); *see* Motion at 36-37.[12]

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion to Dismiss.

Respectfully submitted on this 17th day of September, 2018,

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[12] Plaintiffs incorrectly suggest that *Dep't of Agric. & Consumer Servs. v. Miami-Dade Cty.*, 790 So. 2d 555, merely rejects "the idea that a plaintiff has standing to assert *other individuals' rights*." Response at 22 (emphasis in original). To the contrary, that portion of the court's opinion addresses an alternative argument. *See id.* ("*Moreover and equally important*, neither the County nor City have standing to assert the Fourth Amendment rights of individual property owners." (emphasis added)).

CERTIFICATE OF SERVICE

I hereby certify that the undersigned electronically filed the foregoing with the Clerk of the Courts on September 17th, 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