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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' MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

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BACKGROUND

The Florida Constitution grants the Legislature plenary authority to preempt local regulation in any field not expressly reserved to local authorities. *See* Art. VIII, §§ 1(f), (1)(g), 2(b), Fla. Const. As the Florida Supreme Court has explained, if the rule were otherwise, the State's "political subdivisions would have the power to frustrate the ability of the Legislature to set policies for the state." *Metro. Dade Cty. v. Chase Fed. Hous. Corp.*, 737 So. 2d 494, 504 (Fla. 1999).

The Legislature has exercised that authority to reserve many areas of regulation for itself, including, for example, the establishment of a minimum wage and the use or sale of polystyrene products. *See Weston* Compl. ¶ 26. The Legislature has also reserved for itself the regulation of firearms and ammunition, an area of law uniquely poised at the intersection of public safety and citizens' constitutional rights. The Joe Carlucci Uniform Firearms Act ("the Uniform Firearms Act" or "the Act"), enacted in 1987, preempts—with certain exceptions—"the whole field of regulation of firearms and ammunition." § 790.33(1), Fla. Stat. Florida is now one of at least 43 states that substantially limits the local regulation of firearms. *See Preemption of Local Laws*, GIFFORDS LAW CENTER (2017).[1]

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

As its title suggests, the express purpose of the Uniform Firearms Act was to "provide uniform firearms laws in the state." § 790.33(2)(a), Fla. Stat. To that end, the Act establishes Florida general law as both the floor and ceiling in the field of firearms, on the one hand invalidating regulation that is more restrictive than State law and, on the other hand, "requir[ing] local jurisdictions to enforce state firearms laws." *Id.* The Act, moreover, applies not only to local governments, but also to "state governmental entities" other than the Legislature itself. *Fla. Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966, 972 (Fla. 1st DCA 2013).

Until its amendment in 2011, Section 790.33 provided no mechanism by which aggrieved citizens could deter local governments and their officials from ignoring its strictures. Citizens' only options were to conform their behavior to invalid local ordinances or challenge them in court, at citizens' expense and with no attendant financial burden on the responsible parties. Thus, despite the Act, local governments continued to enact and enforce preempted regulations.

For example, "[i]n 2000, the City of South Miami passed [an ordinance that] required locking devices on firearms stored within the city." *Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So. 2d 504, 504 (Fla. 3d DCA 2002). Under any reading of the Act, the ordinance was a preempted "regulation of firearms." § 790.33(1), Fla. Stat. It was, moreover, materially identical to an ordinance that, six years later, the Supreme Court of the United States found unconstitutional. *See Dist. of Colum. v.*

Heller, 554 U.S. 570 (2008). Only after two years of litigation were residents of the City of South Miami finally able to vindicate their rights by obtaining a ruling that the ordinance was preempted and therefore invalid. *See City of S. Miami*, 812 So. 2d at 506.

In response to the *City of South Miami* case and others like it, the Legislature amended Section 790.33 by creating a private right of action and providing for civil penalties that may be sought by persons and organizations "adversely affected" by a preempted local firearms regulation. § 790.33(3)(f), Fla. Stat; *see* Fla. Sen. Final Bill Analysis, HB 45, at 2-3 & nn. 13-14 (June 28, 2011). Those citizens and organizations may now seek declaratory and injunctive relief, as well as actual damages (capped at $100,000), legal fees, and costs. § 790.33(3)(f), Fla. Stat. If the court determines that the defendant's violation of the statute was "knowing and willful," the plaintiff may ask "the court [to] . . . assess a civil fine of up to $5,000 against the elected or appointed local government official . . . under whose jurisdiction the violation occurred." *Id.* § 790.33(3)(c). Moreover, public funds may not be used "to defend or reimburse" an official found to have violated the statute "knowingly and willfully," and the Governor may remove such an official from office. *Id.* § 790.33(3)(d), (e). In a suit seeking declaratory and injunctive relief under Section 790.33(3)(b), defendants are barred from claiming as a defense that they were acting in good faith or on advice of counsel. Collectively, these provisions

put the onus on local officials to ensure that local governments comply with Florida general law.

Plaintiffs in these consolidated actions[2] challenge the constitutionality of Section 790.33, as well as Section 790.335 (which prohibits registries and lists of lawfully owned firearms and their owners). Plaintiffs filed their complaints in the immediate aftermath of the mass shooting in Parkland, Florida that occurred on February 14, 2018. *See Counties* Compl. ¶ 2; *Weston* Compl. ¶ 35-36; *Daley* Compl. ¶ 7. They allege that they would have gone further than the State's comprehensive legislative response to that tragedy (the Marjory Stoneman Douglas High School Public Safety Act), aspects of which the Attorney General is now defending in state and federal court. *See*, *e.g.*, *Nat. Rifle Ass'n of Am., Inc. v. Bondi*, No. 4:17-cv-128 (N.D. Fla.); *Hunt v. State*, No. 2018-CA-000564 (Leon Cty. Cir. Ct.). Among other things, that legislation made Florida the first State in the country to prohibit the sale of *any* firearm to persons under the age of 21. *See* 790.065(13), Fla. Stat.

These actions, however, are not about the extent to which the State should regulate firearms. They concern only whether the United States and Florida constitutions bar the State from providing mechanisms by which its citizens may

[2] The plaintiffs in *Weston v. DeSantis*, 2018-CA-000699 (Leon Cty. Cir. Ct.), are hereinafter referred to as the "*Weston* Plaintiffs." The plaintiffs in *Daley v. State*, 2018-CA-001509 (Leon Cty. Cir. Ct.), are hereinafter referred to as the "*Daley* Plaintiffs." The Plaintiffs in *Broward County v. State*, 2018-CA-000882 (Leon Cty. Cir. Ct.), are hereinafter referred to as the "County Plaintiffs."

enforce and deter violation of the decades-old decision of their duly elected representatives, in the Uniform Firearms Act, that the regulation of firearms and ammunition is so important that it must be consistent throughout the State and therefore must be decided by the Legislature. Because they do not, Defendants move for summary judgment on all counts.[3]

ARGUMENT

Plaintiffs level numerous constitutional challenges against Section 790.33 and 790.335. Specifically, they claim that (1) Section 790.33 violates Article VIII, Section 2(b) of the Florida Constitution; (2) both statutes are unconstitutionally vague on their face and as applied; (3) enforcement of the statutes against Plaintiffs

[3] The Court dismissed the Auditor General and the Broward County State Attorney and Sheriff as improper defendants, and Plaintiffs voluntarily dismissed the Chief Financial Officer and Broward County Clerk of Courts. These actions proceed against the remaining defendants—the State of Florida, the Governor of Florida, the Attorney General of Florida, the Florida Commissioner of Agriculture, and the Commissioner of the Florida Department of Law Enforcement ("FDLE Commissioner"). The Governor of Florida is separately represented and is not a party to this Motion.

The Commissioner of Agriculture joins this motion only in part; specifically, she believes that all counts against her should be dismissed because she is an improper defendant. *See infra* Section XI.

Except as otherwise stated herein, the term "Defendants" refers to all defendants other than the Governor and the Commissioner of Agriculture.

would violate sovereign and legislative immunity; (4) Section 790.33 violates Due Process and Equal Protection rights; (5) Subsection 790.33(3)(e) violates Article IV, Section 7 of the Florida Constitution and separation of powers principles; (6) the same provision unconstitutionally impairs obligations of contract; (7) Section 790.33 violates free speech and assembly rights; (8) Section 790.33 violates constituents' rights to petition and instruct their representatives; and (9) Subsection 790.33(3)(b) usurps the constitutional authority of the courts.

In addition, the County Plaintiffs seek declaratory judgment that a number of proposed regulations are consistent with the challenged provisions, irrespective of whether the provisions are constitutional.

Each claim is addressed in turn.

I. Section 790.33, Florida Statutes Does Not Violate Article VIII, Section 2(b) Of The Florida Constitution.

The *Daley* Plaintiffs contend that Section 790.33, Florida Statutes "impinge[s] on Plaintiff Municipalities' right to self-govern and violate[s] the home rule provision of the Florida Constitution." In their view, "the Florida state legislature cannot tell" them "whether or not to pass ordinances." *Daley* Compl. ¶¶ 139, 137-38.

The *Daley* Plaintiffs are mistaken. Their argument is premised on the grant of "home rule" authority in Article VIII, Section 2(b) Florida Constitution, which "specifically recognizes . . . that municipalities 'may exercise any power for

municipal purposes *except as otherwise provided by law.*'" *Masone v. City of Aventura*, 147 So. 3d 492, 494-95 (Fla. 2014) (emphasis in original). "The critical phrase of article VIII, section 2(b)—'except as otherwise provided by law'—establishes the constitutional superiority of the Legislature's power over municipal power." *Id.* 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); *see* Art. VIII, § 1(f)-(g), Fla. Const.

Accordingly, where the Legislature "provide[s] by law" that local governments "may [not] exercise" a particular subset of home rule authority, Art. VIII, § 1, Fla. Const.—here, the regulation of firearms—that restriction is expressly sanctioned by the Florida Constitution. Plaintiffs' claim therefore fails.

II. The Challenged Provisions Are Not Unconstitutionally Vague.

Plaintiffs allege that the challenged provisions are unconstitutionally vague "both facially and as applied." *Counties* Compl. ¶ 114; *Daley* Compl. ¶¶ 117. As discussed below, this claim fails because the statute is clear. However, as a threshold matter, Plaintiffs' vagueness challenge to Sections 790.335 and 790.33(3)(c), (d), and (e) is foreclosed because 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 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)).

A. Plaintiffs' Facial Challenge To Section 790.33, Florida Statutes

Plaintiffs claim that Section 790.33 is "void for vagueness" because it "fails to give adequate notice of what conduct is prohibited." *Counties* Compl. ¶¶ 107, 110. Specifically, Plaintiffs object that certain provisions of the statute vary in their use of synonyms for "regulation," that the statute does not define certain terms, and that it is unclear whether the statute prohibits local regulation of firearm "components" and local actions taken in a "proprietary" rather than "regulatory" capacity. Plaintiffs' arguments are misplaced.

1. Legal Standard

"[I]n order to withstand [a vagueness] challenge, a statute must provide persons of common intelligence and understanding adequate notice of the proscribed conduct." *State v. Catalano*, 104 So. 3d 1069, 1075 (Fla. 2012). But "statutes do not have to set determinate standards or provide mathematical certainty." *Id.* at 1076. Instead, "a statute need only establish 'a comprehensible standard of prohibited core

conduct.'" *State v. Barnes*, 686 So. 2d 633, 637 (Fla. 2d DCA 1996). Plaintiffs, in turn, must "shoulder the heavy burden of establishing that the statute . . . specifies no comprehensible standard of conduct at all such that it has no core." *Id.* (internal citations and quotation marks omitted). In other words, "[t]he existence of obviously impermissible" conduct "renders [a statute] susceptible to some lawful applications, defeating the facial constitutional claim." *Bennett v. Walton Cty.*, 174 So. 3d 386, 395 (Fla. 1st DCA. 2015).

Moreover, the Supreme Court of the United States and the Florida courts have "'expressed greater tolerance of enactments with civil rather than criminal penalties," like Section 790.33, "because the consequences of imprecision are qualitatively less severe.' Indeed, a civil statute is unconstitutionally vague only if it is so indefinite as 'really to be no rule or standard at all.'" *Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1310 (11th Cir. 2009) (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982)).[4]

[4] *See Scudder v. Greenbrier C. Condo. Ass'n, Inc.*, 663 So. 2d 1362, 1367-68 (Fla. 4th DCA 1995) ("[E]ven greater latitude is afforded civil statutes in light of a vagueness challenge. Therefore, any doubts as to the constitutionality of the statute must be resolved in favor of its constitutionality." (citations and internal quotation marks omitted)).

2. Section 790.33(3) Satisfies The Applicable Legal Standard.

Section 790.33(3) satisfies this standard because it makes plain what "core conduct" it prohibits. As the First DCA has explained, Subsection (3)(a) "clearly sets forth what is prohibited by law, which is the enactment or enforcement of firearms regulations." *Florida Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, 461 (Fla. 1st DCA 2017).[5] Subsection (1), moreover, clarifies that the "regulation of firearms and ammunition" reserved to the Legislature, § 790.33(1), (3)(a), Fla. Stat., "include[es] the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof," *id.* § 790.33(1).

Many "obviously impermissible" ordinances, rules, and regulations fall within that plain language. For example, regulation of the "ownership, possession, [and] storage" of firearms, *id.* § 790.33(1), includes a city ordinance requiring that firearms be stored with trigger locks, *see Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So. 2d 504, 504 (Fla. 3d DCA 2002), as well as a university's rule limiting the storage of firearms in vehicles parked on campus, *see Fla. Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966, 972 (Fla. 1st DCA 2013). As the courts have

[5] Subsection (1) reserves to the Legislature the "the whole field of regulation of firearms and ammunition." § 790.33(1), Fla. Stat. Subsection (3)(a), in turn, provides civil liability for any local government or local official who "violates the Legislature's occupation of the whole field of regulation of firearms and ammunition, as declared in subsection (1), by enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon such exclusive occupation of the field shall be liable as set forth herein." *Id.* § 790.33(3)(a).

made clear, the existence of such examples is sufficient to "defeat[] the facial constitutional claim." *Bennett*, 174 So. 3d at 388.

3. The Legislature's Use Of Synonyms For "Regulation" In Section 790.33 Does Not Render The Statute Unconstitutionally Vague.

Plaintiffs object that, while Subsections 790.33(1) and (3)(a) preempt and prohibit "ordinances," "regulations," and "rules" concerning firearms and ammunition, Subsection (3)(f) "suggests" that it may [also] apply to any 'measure, directive, rule, enactment, order or policy promulgated.'" *Weston* Compl. ¶ 30 (quoting § 790.33(3)(a), (f), Fla. Stat.). As discussed above, however, the statute prohibits "the enactment or enforcement of firearms regulations." *Florida Carry, Inc.*, 212 So. 3d at 461; *see* § 790.33(1), (3)(a), Fla. Stat. (preempting and prohibiting "enacting or causing to be enforced" any local "regulation of firearms and ammunition"). "Measures," "directives," "enactments," "rules," "orders," and "policies" are all forms of "regulation[]" that are preempted and prohibited by the statute. The use of those synonyms in Subsection (3)(f) does not render the statute unconstitutionally vague. Rather, those terms confirm that the statute broadly prohibits *all* regulation of firearms, regardless of whether such regulation is styled as an "ordinance" or, for example, a "measure" or "policy." *See Penelas v. Arms Tech., Inc.*, 778 So. 2d 1042, 1045 (Fla. 3d DCA 2001) (affirming dismissal of county's lawsuit against firearms manufacturer because the lawsuit was "an attempt

to regulate firearms and ammunition through the medium of the judiciary" and a "round-about attempt" to circumvent Section 790.33, Florida Statutes).

The statute is unambiguous on this point. Indeed, any contrary reading would be unreasonable, as it would lead to the "absurd consequence," *State v. Atkinson*, 831 So. 2d 172, 174 (Fla. 2002), of "defeat[ing] [the statute's] underlying objectives," *Brinkmann v. Francois*, 184 So. 3d 504, 510 (Fla. 2016). Specifically, reading Section 790.33 to prohibit some forms of regulation but not others (*e.g.*, "ordinances" but not "measures" or "policies") would defeat the Legislature's express purposes of "occupying *the whole field of regulation* of firearms and ammunition," § 790.33(1), Fla. Stat. (emphasis added), "provid[ing] uniform firearms laws in the state," and "deter[ring] and prevent[ing] the violation of this section," *id.* § 790.33(2) (emphases added). As the Third DCA explained in *Penelas*, because "round-about attempt[s]" to regulate firearms through means other than "ordinances" would defeat the statute's purpose, they are prohibited. 778 So. 2d at 1045.

Nor does the use of synonyms for "regulation" in Subsection (3)(f) render the statute vague in light of the "maxim that 'legislative use of different terms in different portions of the same statute is evidence that different meanings were intended.'" *Florida Carry, Inc.*, 212 So. 3d at 463 (internal citation omitted). In *Florida Carry, Inc.*, the First DCA was "aware of th[at] maxim" but nevertheless

found it clear that the term "promulgated" in Subsection (3)(f) was co-extensive with the term "enacted" in Subsection (3)(a) because "the Legislature was primarily concerned with the enactment of local regulations and ordinances in the field of firearms regulation." *Id.*

4. *Section 790.33 Is Not Unconstitutionally Vague For Failure To Define Certain Terms.*

Plaintiffs also contend that the statute is void for vagueness because it "does not sufficiently define" certain terms. *Daley* Compl. ¶ 116. Specifically, Plaintiffs object that the statute "preempts regulation of 'the whole field of regulation of firearms and ammunition' without a clear definition of that phrase," and allows "damages against 'any entity' that 'promulgated' a 'measure,' 'directive,' 'rule,' 'order' or 'policy' in violation" of the preemption "without a clear definition of any of those quoted terms." *Daley* Compl. ¶ 116. It is black letter law, however, that the Legislature "need not define every term," and "[g]eneral terms can still give fair and clear warning even if the specific facts at issue are not specified by the statute." *United States v. Brown*, 637 F. App'x 935, 940 (7th Cir. 2016)

As discussed above, the phrase "the whole field of regulation of firearms and ammunition" plainly refers to all regulation of firearms and ammunition "[e]xcept as expressly provided by the State Constitution or general law," § 790.33(1), Fla. Stat., and Subsection (3)(a) of the statute says exactly what conduct violates the preemption of that "whole field": "the enactment or enforcement of firearms

regulations," *Florida Carry, Inc.*, 212 So. 3d at 461. The term "promulgated" in Subsection (3)(f) means "enacted," *see id.* at 463-64, and "measures," "directives," "enactments," "rules," "orders," and "policies" are all "regulations" preempted and prohibited by the statute.

Those words, "though not defined in the statute, are words of common usage that have plain and ordinary meanings." *United States v. Gagliardi*, 506 F.3d 140, 147 (2d Cir. 2007) (rejecting vagueness challenge premised on statute's failure to define the words "attempt," "persuade," "induce," "entice," and "coerce"). They do "not need further technical explanation" and are "sufficiently precise to give a person of ordinary intelligence fair notice as to what is permitted and what is prohibited and to prevent arbitrary and discriminatory enforcement." *United States v. Tykarsky*, 446 F.3d 458, 473 (3d Cir. 2006) (internal quotation marks omitted); *United States v. Cullen*, 499 F.3d 157, 163, (2d Cir. 2007) ("Although we recognize in many English words there lurk uncertainties, to meet the fair warning prong an ounce of common sense is worth more than an 800-page dictionary." (citation omitted)).

5. *Plaintiffs' Other Contentions That The Statute Is Unconstitutionally Vague Are Without Merit.*

Plaintiffs claim that the statute is vague as to whether it prohibits the regulation of firearm "components." *Counties* Compl. ¶ 110. The statute is clear on this point: It does. The Legislature's express purpose was to prohibit local

"regulations relating to firearms, ammunition, *or components thereof*." § 790.33(2)(a), Fla. Stat.

Plaintiffs suggest that this very language renders the statute ambiguous because the term "components" appears only in Subsection (2)(a) of the statute, which declares the Legislature's "policy and intent," and the term does not appear in the substantive provisions of the statute, which preempt and prohibit "the regulation of firearms and ammunition," *id.* § 790.33(1), Fla. Stat. However, the regulation of firearms "components"—for example, limiting the range of permissible firing pins or stocks—has both the purpose and effect of regulating the use and possession of firearms and, therefore, *is* "the regulation of firearms." Moreover, as discussed above, the First DCA has rejected the argument that "'legislative use of different terms'" in various provisions of Section 790.33 "'is evidence that different meanings were intended,'" where, as here, strict adherence to the maxim would defeat the Legislature's stated purpose. *Florida Carry, Inc.*, 212 So. 3d at 463 (internal citation omitted).

Plaintiffs also contend that the statute is vague as to whether it prohibits them from taking certain actions "as proprietors," "particularly when leasing" their properties and facilities. *Counties* Compl. ¶ 110. The statute is clear on this point, too: It prohibits only the "*regulation* of firearms and ammunition," *i.e.*, actions taken in a *regulatory capacity*. § 790.33(1), Fla. Stat. (emphasis added). Actions taken in

a purely *proprietary* capacity, such as leasing (or declining to lease) county-owned properties or facilities to a particular individual or business, are not "regulation" in any sense of the term. Such actions therefore fall outside the statute's ambit. However, to the extent Plaintiffs seek to enact an ordinance providing that "firearms and ammunition, including any components thereof, shall be prohibited on any property or facility owned or operated by" them, *see Counties* Compl. Ex. A § 18-100, such ordinance would be a preempted exercise of *regulatory* authority.

Plaintiffs further claim that, "although subsection 790.33(4)(a) contains a purported exception for zoning measures that 'encompass firearms businesses along with other business,' that language is also vague and ambiguous." *Weston* Compl. ¶ 30. Plaintiffs do not explain *why* they believe that provision is vague. In any event, the provision is clear: "Zoning ordinances that encompass firearms businesses along with other businesses," are permissible, "except that zoning ordinances that are designed for the purpose of restricting or prohibiting the sale, purchase, transfer, or manufacture of firearms or ammunition as a method of regulating firearms or ammunition are in conflict with this subsection and are prohibited." § 790.33(4)(a). In other words, generally applicable zoning ordinances (those that are neutral as to firearms and ammunition) are permissible unless their purpose is to regulate firearms or ammunition. For example, an ordinance that prohibits "manufacturing" in

residential areas may be enforced against a business manufacturing firearms in a residential area. *See* 2016 Op. Att'y Gen. 06 (Fla. A.G. 2016).[6]

B. Plaintiffs' Challenge To Section 790.335, Florida Statutes

Section 790.335 prohibits state agencies and local governments from keeping "any list, record, or registry of privately owned firearms or any list, record, or registry of the owners of those firearms." § 790.335(2), Fla. Stat. An exception permits "[r]ecords kept pursuant to the recordkeeping provisions of s. 790.065," which governs background checks conducted by the Florida Department of Law Enforcement ("FDLE"). *See id.* § 790.335(3)(e)(1). The County Plaintiffs argue that the exception renders the statute unconstitutionally vague because the exception also provides a rule of construction, that "[n]othing in this paragraph shall be construed to allow the maintaining of records . . . of firearm transactions." *Id.*

[6] The *Daley* Plaintiffs also object that the statute "invites arbitrary enforcement" because it subjects officials to "legal action by private persons" who are "permitted to reach their own conclusions as to whether an ordinance is preempted and may seek to enforce" the statute. *Daley* Compl. ¶¶ 116, 119. The same is true, however, of every statute that creates a private right of action. Such statutes are not therefore constitutionally infirm, of course, because a private citizen's "conclusions as to whether" a defendant has violated the law are merely the basis for his lawsuit, which is, in turn, subject to judicial process. Moreover, even in the absence of a penalty provision, a private party affected by a local regulation of firearms would remain free to file suit challenging the validity of such regulation and, in the course of doing so, draw his "own conclusions" regarding the statute. The *Daley* Plaintiffs fail to show how this "invites arbitrary enforcement." The penalty provision indeed curbs any potential for arbitrary enforcement by limiting standing to those "adversely affected" by a preempted regulation.

§ 790.335(3)(e)(2); *see Counties* Compl. ¶ 112. Plaintiffs' argument fails for two reasons.

First, Section 790.065 expressly permits only the FDLE, not local governments, to keep certain records, so there is no reading of the exception that allows *counties* to keep records of firearm transactions. *See id.* § 790.065(4)(b) ("Notwithstanding the provisions of this subsection, the Department of Law Enforcement may maintain records of NCIC transactions . . . .").

Second, even as to the FDLE, the statute is unambiguous. Section 790.065(4)(b) provides that the FDLE may maintain only certain specified records: documentation "required by the Federal Government" and "a log of dates of requests for criminal history records checks, unique approval and nonapproval numbers, license identification numbers, and transaction numbers corresponding to such dates for a period of not longer than 2 years or as otherwise required by law." Section 790.065(4)(c) adds that the statute "shall [not] be construed to allow the State of Florida to maintain records containing the names of purchasers or transferees who receive unique approval numbers or to maintain records of firearm transactions." The exception in Section 790.335(3)(e) mirrors this structure, *avoiding* ambiguity by making clear that FDLE employees may not be subjected to liability under Section 790.335(2) for maintaining the specific records enumerated in that

subsection, so long as those employees do not otherwise "maintain records of firearm transactions."

C. Plaintiffs' "As Applied" Challenge

"[A]s applied vagueness challenges involve a factual dimension in that vagueness is determined in light of the facts of the case at hand." *United States v. Molina*, 484 F. App'x 276, 282–83 (10th Cir. 2012) (internal citation and quotation marks omitted). Plaintiffs' claim must be rejected because they have not alleged, much less proved, any set of facts under which the statute is unconstitutional.

To be sure, Plaintiffs allege in general terms that they would like to regulate firearm "components," "require records of firearm transactions," and conduct activity in their "proprietary" capacity, such as lease their property and facilities. *See Counties* Compl. ¶¶ 110-14. As discussed above, however, the answers to those questions are clear; they certainly do not pose issues of "'hopeless indeterminacy,'" as the Supreme Court of the United States requires of plaintiffs bringing as-applied vagueness challenges. *Salman v. United States*, 137 S. Ct. 420, 428-29 (2016).[7] The

[7] Plaintiffs identify a number of other proposed firearms regulations in their complaints, but they do not allege that the challenged provisions are "unconstitutionally vague" as applied to each of them. In any event, the challenged provisions are *not* vague as applied to the proposed regulations, many of which are discussed below, *see supra* Section X.

Supreme Court has indeed rejected vagueness challenges premised on such "theories as to what the statute covers." *Hill v. Colorado*, 530 U.S. 703, 733 (2000). "There is little doubt that imagination can conjure up hypothetical cases in which the meaning of [statutory] terms will be in nice question," but "because we are [c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Id.*

Moreover, to the extent Plaintiffs have questions as to whether particular regulations would fall within the statute's proscription, they may seek an advisory opinion of the Attorney General "to gauge the application of [the statute] to specific situations," *Mason v. Fla. Bar*, 208 F.3d 952 (11th Cir. 2000), as local governments have done many times.[8] The courts have repeatedly held that the availability of such opinions "bolsters [a statute's] validity," *id.*, and "weighs against a finding of vagueness," *Fla. Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legislative Info. Servs.*, 431 F. Supp. 2d 1228, 1235 (N.D. Fla. 2006) (citations omitted).

Alternatively, in denying Defendants' Motion to Dismiss, this Court ruled that Plaintiffs are free to seek declaratory judgment as to whether particular local regulations are preempted, as the County Plaintiffs have done here. *See Counties*

[8] *See*, *e.g.*, 2000 Op. Att'y Gen. 42 (Fla. A.G. 2000); 2005 Op. Att'y Gen. 40 (Fla. A.G. 2005); 2008 Op. Att'y Gen. 34 (Fla. A.G. 2008); 2011 Op. Att'y Gen. 20 (Fla. A.G. 2011); 2011 Op. Att'y Gen. 17 (Fla. A.G. 2011); 2016 Op. Att'y Gen. 06 (Fla. A.G. 2016).

Compl. ¶¶ 135-67; *see also infra* Section X. The courts have addressed many such questions.[9] These alternatives are the proper course in light of the Florida Supreme Court's admonition that "trial courts . . . [should] exercise their discretion guardedly when considering requests for a declaratory judgment on a statute's constitutionality." *Martinez v. Scanlan*, 582 So. 2d 1167, 1171 n.2 (Fla. 1991). The Court should therefore decline to address the many, hypothetical questions posed by Plaintiffs.

III. Enforcement Of the Challenged Provisions Against Plaintiffs Would Not Violate Sovereign Or Legislative Immunity.

A. Sovereign Immunity

The local government plaintiffs claim that "a cause of action for damages . . . against [them] for performing the discretionary governmental act of enacting or enforcing ordinances or regulations" violates their sovereign immunity. *Weston* Compl. ¶ 70. That claim fails because the Florida Constitution gives the Legislature the authority to waive the immunity of the State and its subdivisions, including counties and municipalities, *see*, *e.g.*, *Am. Home Assur. Co. v. Nat'l R.R. Passenger*

[9] *See*, *e.g.*, *Fla. Carry, Inc. v. Thrasher*, 248 So. 3d 253, 259–60 (Fla. 1st DCA 2018) ("The prohibitions and penalties for encroachment on preemption of firearms and ammunition contained in section 790.33(3) do not apply to defensive devices as defined by section 790.06(12) 13. because those devices are not firearms or ammunition."); *Foreman v. City of Port St. Lucie*, 294 F. App'x 554, 556–57 (11th Cir. 2008) ("While it is true that Fla. Stat. § 790.33 does preempt municipal regulation of firearms, a BB gun is not a firearm under Chapter 790 of the Florida Statutes.").

Corp., 908 So. 2d 459, 471-72 (Fla. 2005), and the Florida Supreme Court has held that the Legislature does so when it expressly creates a statutory cause of action against them, *see*, *e.g.*, *Bifulco v. Patient Bus. & Fin. Servs., Inc.*, 39 So. 3d 1255, 1257 (Fla. 2010).[10] The First DCA has applied these principles and held that sovereign immunity does not apply in actions brought under Section 790.33. *See Fla. Carry, Inc. v. Univ. of Fla.*, 180 So. 3d 137, 149-50 (Fla. 1st DCA 2015). The same logic extends to Section 790.335, which also expressly creates a cause of action and civil penalties against local governments and officials.

Plaintiffs point to *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979), and *Wallace v. Dean*, 3 So. 3d 1035 (Fla. 2009), which address the Legislature's waiver of sovereign immunity in tort actions in Section 768.28, Florida Statutes. In *Commercial Carrier* and *Wallace*, the Florida Supreme Court found an implicit exception to that waiver for tort actions premised on "certain [quasi-legislative] policy-making, planning or judgmental governmental functions,"

[10] *See Bifulco*, 39 So. 3d at 1257 ("[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. By enacting chapter 440, the Legislature waived 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, 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").

which, the Court held "cannot be the subject of traditional tort liability." *Wallace*, 3 So. 3d at 1053 (citing *Common Carrier Corp.*, 371 So. 2d at 1020).

Those decisions are inapposite because they concern "traditional tort liability" and, therefore, traditional *defenses* to such liability. Unlike Section 768.28, however, the statutes at issue here do not subject governmental entities to "traditional tort liability"; they instead create statutory causes of action and thus cannot be presumed to implicate traditional common law defenses. *See Fla. Carry, Inc.*, 180 So. 3d at 149 (holding that because Section 790.33(3) does not create a tort action, actions against local officials may proceed without adhering to the procedural strictures of Section 768.28). To the contrary, the pertinent common law tradition (immunity for planning-level decisions) is antithetical to the statutory cause of action, which expressly provides for such liability. *See Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219, 1223 (Fla. 1999) (holding that "statutory causes of action are not limited by the" common law "economic loss rule" where that rule is contrary to the statutory scheme).

Moreover, the rationale underlying the "governmental function" exception recognized in *Common Carrier* and *Wallace* does not extend to the challenged provisions. As the court explained in those decisions, government planning decisions (as contrasted with ministerial decisions) "cannot be the subject of traditional tort liability" because officials would "be subjected to scrutiny by judge or jury as to the

wisdom of their performance." *Common Carrier Corp.*, 371 So. 2d at 1053, 1022. The challenged provisions do not subject local planning decisions to such scrutiny. Rather, they *prohibit* local planning decisions in the field of firearms and ammunition, so there is no lawful planning decision for a finder of fact to second guess. *Compare id.* (addressing the application of the exception to traffic planning, an area of regulation in which local governments' authority to act is well-established and not preempted). As discussed above, were the rule otherwise, the Legislature's plenary authority to preempt local regulation, *see supra* Section I, would be unenforceable and therefore toothless.

B. Legislative Immunity

Plaintiffs' legislative immunity claim fares no better. The legislative immunity that 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."). And it is well-established that common law immunities exist at the pleasure of the Legislature, which is free to "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). That is precisely what the Legislature did in the challenged provisions. *See supra* Section I.

To be sure, the legislative privilege and immunity enjoyed by *State* officials is "codified in article II, section 3, of the Florida Constitution." *League of Women Voters of Fla. v. Fla. House of Representatives* 132 So. 3d 135, 143 (Fla. 2013). Because that provision "identifies the branches of our *state* government," the Florida Supreme Court has repeatedly held "that our separation of powers provision was not intended to apply to local governmental entities and officials." *Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992); *see Citizens for Reform v. Citizens for Open Gov't, Inc.*, 931 So. 2d 977, 989 (Fla. 3d DCA 2006) ("[T]he concept of Constitutional separation of powers simply does not exist at the local government level."). Thus, whatever legislative privilege or immunity is rooted in that provision does not extend to local officials.

Plaintiffs also point to *Bogan v. Scott-Harris*, which holds that 42 U.S.C. § 1983 does not abrogate traditional common law immunity for "legitimate legislative activity," including such activity at the local level. 523 U.S. 44, 54 (1998). The Supreme Court of the United States has expressly rejected Plaintiffs' implication that legislators' immunity to suits under that statute "is found in constitutional [law]." *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 403 (1979). Such immunity instead derives from the limited scope of

the waiver of common law immunity Congress intended in Section 1983. *Id.* at 404. (explaining that "the absolute immunity for state legislators recognized in [these cases] reflect[s] the Court's interpretation of federal law," not any constitutional provision (citations and footnotes omitted)).

IV. Section 790.33, Florida Statutes Does Not Violate Due Process Or Equal Protection Rights.

A. Substantive Due Process And Equal Protection

Plaintiffs claim 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. Specifically, Plaintiffs contend that the statute is irrational for three reasons: (1) it subjects officials who enact or enforce preempted *firearms* regulations—but not officials who enact or enforce preempted regulations in other fields—to civil liability and penalties, *Weston* Compl. ¶ 101; (2) "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," *id.* ¶ 104; and (3) on Plaintiffs' reading of the statute, certain provisions allow penalties not only against local officials who vote *for* preempted regulations, but also against any official 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. Plaintiffs' claims are without merit.

1. Relying upon the Florida Supreme Court's decision in *State v. Tedder*, Plaintiffs contend that "elected officials have a property right in their office for the duration of their term." 143 So. 148, 150 (Fla. 1932). Accordingly, Plaintiffs claim, their due process and equal protection challenges to Subsection (3)(e) must be considered under the rubric of strict scrutiny because that provision subjects officials to removal from office. *See Counties* Compl. ¶ 127-28; *Daley* Compl. ¶ 123-29. To be sure, *Tedder* and its progeny recognize that elected officials have such a property right, but they hold only that officials subject to removal from office are entitled to procedural due process (*i.e.*, notice and an opportunity to be heard). *See Tedder*, 143 So. at 150. The Florida Supreme Court has consistently held that substantive due process challenges premised solely on interference with a property interest are subject to rational basis review. *See*, *e.g.*, *Haire v. Fla. Dep't of Agric. & Consumer Servs.*, 870 So. 2d 774, 782 (Fla. 2004) ("Because . . . the Citrus Canker Law is a valid exercise of the State's police power . . . , the court determined that the reasonable relationship test applied."); *Ricketts v. Vill. of Miami Shores*, 232 So. 3d 1095, 1098 (Fla. 3d DCA 2017) (zoning regulation subject to rationality review).

That 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). 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.[11]

2. Plaintiffs' argument that the statute is irrational because it does not *also* create penalties for officials who enact or enforce preempted regulations in fields other than firearms and ammunition fails because the State's interest in enforcing a uniformity requirement is especially great in the area of firearms and ammunition, which, as discussed above, is uniquely poised at the intersection of public safety and citizens' constitutional rights, and in which local governments have a demonstrated history of intransigence. *See* Fla. Sen. Final Bill Analysis, HB 45, at 2-3 & nn. 13-14 (June 28, 2011). Moreover, even applying strict scrutiny, the Supreme Court of the United States and the Florida courts have rejected "underinclusivity" arguments because "policymakers may focus on their most pressing concerns.'" *Mance v.*

[11] The *Weston* Plaintiffs also bring the same claim under Article III, § 11(b) of the Florida Constitution, which provides that "political subdivisions or other governmental entities may be classified only on a basis reasonably related to the subject of the law." That claim fails for the same reasons.

Sessions, 880 F.3d 183, 191 (5th Cir. 2018) (quoting *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1668 (2015) (footnotes omitted)).[12]

3. Plaintiffs' objection that, unlike private property owners, local governments may not "pass and enforce 'rules' relating to firearms and ammunition on their property," *Weston* Compl. ¶ 104, fails for much the same reasons. In addition, local governments and private citizens plainly are not similarly situated. There can be no question the Legislature acted reasonably by penalizing the creation of a patchwork firearms regulatory regime while leaving private citizens free to exclude firearms from their homes if they wish. Moreover, unlike local government regulations, whatever "rules" private citizens wish to enforce in their homes do not carry civil or criminal penalties.

4. The County Plaintiffs further contend that Subsections 790.33(3)(c) and (3)(e) are arbitrary because, on Plaintiffs' reading of the statute, those provisions allow enforcement action not only against a local official who vote *for* preempted regulations, but also against any official 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. Plaintiffs argue that such officials may be penalized "for

[12] *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)).

the mere fact that he or she was a member of the governing body at the time of enactment of the offending legislation." *Id.*

Plaintiffs' argument fails because it depends on an erroneous reading of the statute. Reading key language in isolation, they characterize Subsection (3)(e) as allowing the Governor to remove from office "any 'person acting in an official capacity for any entity enacting' a prohibited regulation." *Counties* Compl. ¶ 125 (quoting § 790.33(3)(e), Fla. Stat.). In full, however, Subsection (3)(e) provides that:

> A knowing and *willful violation* of any provision of this section *by a 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 shall be cause for termination of employment or contract or removal from office by the Governor.

§ 790.33(3)(e), Fla. Stat. (emphases added). Thus, Subsection (3)(e) penalizes only the "knowing and willful violation" of the preemption "by" a local official. The only conduct that "violat[es]" the statute is the "enactment or enforcement of firearms regulations," *Fla. Carry, Inc.*, 212 So. 3d at 461, and it is unreasonable to suggest that an official who votes *against* or *opposes* a preempted regulation that, despite the official's efforts, becomes law has "enacted" or "enforced" that regulation "knowing[ly] and willful[ly]," subjecting him to potential removal from office.

Plaintiffs' argument as to Subsection (3)(c) fails for similar reasons. That Subsection provides that:

> If 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 or officials or administrative agency head under whose jurisdiction the violation occurred*.

§ 790.33(3)(c), Fla. Stat. (emphasis added). Reading the italicized language in isolation, Plaintiffs contend that fines are available against officials other than those who violate the statute. To the contrary, as the First DCA has explained, "such fines can *only* be assessed against officials for *knowing and willful* violations of the Legislature's preemption of firearms and ammunition regulation." *Fla. Carry, Inc. v. Thrasher*, 248 So. 3d 253, 261 (Fla. 1st DCA 2018) (emphasis added).

Moreover, the penalties set forth in Subsections (3)(b) through (3)(f) are not available "for something that was not expressly prohibited by section 790.33(3)(a)," *Fla. Carry, Inc.*, 212 So. 3d at 464, which prohibits only "the enactment or enforcement of firearms regulations," *id.* at 461. The best reading of Section 790.33(3)(c), therefore, is that fines under Subsection (3)(c) are available only against an official who personally violates the statute and whose violation the court finds "knowing and willful." That reading is reinforced by the canon of constitutional avoidance, as Plaintiffs' proposed reading would subject officials to fines although they satisfy neither a scienter requirement nor, indeed, a *conduct* requirement. *See Bach v. Florida State Board of Dentistry*, 378 So. 2d 34, 36 (Fla. 1st DCA 1979) (due process considerations favor reading statute to require fault or personal violation by would-be defendant).

In the alternative, a facial challenge to the constitutionality of a statute "must fail unless no set of circumstances exists in which the statute can be constitutionally applied." *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004). Thus, even assuming the challenged provisions were unconstitutional as applied to officials who vote against preempted regulations, that would not render the challenged provisions unconstitutional as applied to *other* officials or to local governments.

B. Procedural Due Process

To the extent Plaintiffs contend that Subsection (3)(e) violates procedural due process because it "allows the Governor to remove elected public officers from their office . . . without proper notice or an opportunity to be heard," *Counties* Compl. ¶ 128, Plaintiffs again misread the statute. The Governor may remove officials only if they commit "[a] knowing and willful violation of" the statute, § 790.33(3)(e), Fla. Stat., and the most natural reading of that language is that it presupposes a judicial finding that the official's violation was "knowing and willful," *see id.* § 790.33(3)(c) ("If the court determines that a violation was knowing and willful, the court shall assess a civil fine of up to $5,000 . . . ."). Moreover, even if the statute gave the Governor unilateral authority to assess whether an official's violation is "knowing and willful," nothing in the statute suggests he may do so without giving the official notice and an opportunity to be heard. Any contention that he will is entirely

speculative and therefore premature, as Plaintiffs have presented no evidence that the Governor will do or has done so.

V. Section 790.33(3)(e), Florida Statutes Does Not Violate Article IV, Section 7 Of The Florida Constitution.

Section 790.33(3)(e), Florida Statutes provides that "[a] knowing and willful violation of any provision of this section by a person acting in an official capacity . . . shall be cause for termination of employment or contract or removal from office by the Governor." Plaintiffs claim that this provision violates Article IV, Section 7 of the Florida Constitution, which gives the Governor authority to *suspend*, but not remove, county officers from their posts "for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony." *Id.* § 7(a). In their view, this removal power belongs solely to the Florida Senate, which "may, in proceedings prescribed by law, *remove* from office or reinstate the suspended official." *Id.* § 7(b) (emphasis added). As for "municipal" officers, the Governor may suspend them if "indicted for crime . . . until acquitted and the office filled by appointment for the period of suspension." *Id.* § 7(c).

Plaintiffs' argument is that Article IV, Section 7 "circumscribe[s]" the Governor's role in the removal of local officials and that, accordingly, the "Legislature lacks the authority to expand the Governor's authority." *Counties* Compl. ¶ 63. To the contrary, nothing in Article IV, Section 7 expressly limits the

authority of either the Governor or the Legislature. Plaintiffs' argument therefore depends 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). The *expressio unius* canon is "strictly an aid to statutory construction and not a rule of law," *id.* at 1071, and "[v]irtually 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.").

To be sure, the canon confirms what is apparent from the plain language of Article IV, Section 7: Absent an additional grant of authority, the Governor's only power regarding the removal of local officials is that he may suspend them for certain reasons specified in that provision, pending removal by the Legislature (in the case of county officials) or acquittal (in the case of municipal officials). In other words, like every grant of authority, Article IV, Section 7 has limits.

None of this suggests that the Legislature is without power to *expand* the Governor's baseline authority. In *Nichols v. State ex rel. Bolon*, for example, the Florida Supreme Court rejected the argument that a provision of the Florida Constitution "direct[ing] the Legislature to exclude from 'every office'" "all persons who have been convicted of certain crimes, operates, by the principle of *expressio unius est exclusio alterius*, to prohibit the legislature from establishing any other qualifications for any office." 177 So. 2d 467, 468 (Fla. 1965). The Legislature has, moreover, added to the baseline authority that the Florida Constitution assigns to the Governor in *hundreds* of statutes, *compare generally* Art. IV, § 1, Fla. Const. *to* Ch. 14, Fla. Stat. ("Governor"), and the Florida Supreme Court has never suggested the Legislature is not free to do so, *see*, *e.g.*, *Whiley v. Scott*, 79 So. 3d 702, 717 (Fla. 2011) ("[T]he Florida Legislature may . . . delegate such rulemaking authority to the Executive Office of the Governor.").

For this reason, the Second DCA recently cautioned that the negative implication canon "is often used in a dangerously over-expansive manner in constitutional interpretation." *Hous. Opportunities Project v. SPV Realty, LC*, 212 So. 3d 419, 422 n.5 (Fla. 2d DCA 2016). Specifically, because "the State Constitution is a limitation, not a grant, of power," "[w]e look to the State 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). "There flows from this fundamental concept, as a matter of logic in its application, the inescapable conclusion that the rule of *expressio unius est exclusio alterius* has no application to the provisions of our State Constitution." *Id.* (italics added). In other words, "the *expressio unius* maxim 'should be applied with caution to [state constitutional] provisions . . . relating to the legislative branch of government, since [the maxim] cannot be made to restrict the plenary power of the legislature." *Bush v. Holmes*, 919 So. 2d 392, 420 (Fla. 2006) (Bell, J., dissenting) (citing *State ex rel. Jackman v. Court of Common Pleas of Cuyahoga Cty.*, 224 N.E. 2d 906, 910 (Ohio 1967)), *cited with approval in Hous. Opportunities Project*, 212 So. 3d at 422 n.5.[13]

Plaintiffs also contend that Section 790.33(3)(e) is an unconstitutional delegation of legislative power to the Governor. Specifically, Plaintiffs argue that Article IV, Section 7(b) of the Florida Constitution gives the Senate, not the Governor, power to "remove from office or reinstate the suspended [county]

[13] *See Reale v. Bd. of Real Estate Appraisers*, 880 P.2d 1205, 1213 (Colo. 1994) (finding the *expressio unius* maxim "inapt" when used to imply a limitation in a state constitution because the "powers not specifically limited [in the constitution] are presumptively retained by the people's representatives"); *Baker v. Martin*, 410 S.E. 2d 887, 891 (N.C. 1991) (recognizing that the *expressio unius* maxim has never been applied to interpret the state constitution because the maxim "flies directly in the face" of the principle that "[a]ll power which is not *expressly limited* . . . in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution").

official," *id.* § 7(b), and Article II, Section 3 of the Florida Constitution provides that "[n]o person belonging to one branch [of state government] shall exercise any powers appertaining to either of the other branches unless expressly provided herein." *Counties* Compl. ¶ 65.

In the narrow circumstances present here, the Legislature did not violate the separation of powers by giving the Governor the authority to remove certain officials. Several considerations, taken together, support that conclusion.

First, the powers "appertaining to" each branch of government referenced in Article II, Section 3 are the "legislative power of the state," which "shall be vested in a legislature of the State of Florida," Art. 3, § 1, Fla. Const., the "supreme executive power," which "shall be vested in a governor," *id.* Art. 4, § 1, and the "judicial power," which "shall be vested in a supreme court, district courts of appeal, circuit courts and county courts," *id.* Art. 5, § 1. Together with Article II, Section 3, these provisions mean that, "'except in cases expressly provided for in the Constitution,' all *purely* legislative power of the state shall be exercised exclusively by the Senate and House of Representatives; that all the *purely* executive power of the state shall be exercised exclusively by the Governor; and that all the *purely* judicial power of the state shall be exercised exclusively by the tribunals specified." *State v. Duval Cty.*, 196, 79 So. 692, 697 (1918) (emphases added).

The terms "'legislative powers' and 'legislative authority'" "mean the power or authority to *enact laws*, or to declare what the law shall be." *Duval Cty.*, 79 So. at 697 (emphasis added). Such powers "appertain exclusively to the legislative department, and they cannot lawfully be delegated." *Id.* Where, as here, "the functions assigned" by a statute "are not exclusively legislative . . . in character, the statute does not delegate legislative power . . . in violation of article 2." *Id.* at 698.

Second, the removal power conferred by the challenged statute pertains, at most, to a discrete and partially overlapping authority vested in only one part of the Legislature, the Florida House of Representatives. By contrast, the exclusively "legislative" power referenced in Article II, Section 3 is most naturally understood to refer to "[t]he legislative power . . . vested in" a two-house Legislature. *See* Art. III, § 1 ("The legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate . . . and a house of representatives . . . .").

Third, in enacting Section 790.33(3)(e), the Legislature manifestly did not intend to aggrandize its own powers at the expense of a coordinate branch. *See State v. Ashley*, 701 So. 2d 338, 342 (Fla. 1997) ("Under Florida's constitutional form of government, no branch of state government can arrogate to itself powers that properly inhere in a separate branch.") (quotation marks and citation omitted); *see Clinton v. Jones*, 520 U.S. 681, 699 (1997) (explaining that the separation of powers doctrine provides "'a self-executing safeguard against the encroachment or

aggrandizement of one branch at the expense of the other'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)). To the contrary, the Legislature's enactment assists the Executive branch by helping the Governor to carry out his own constitutionally enumerated duties. *See* Art. IV, § 1, Fla. Const. (providing that the Governor "shall take care that the laws be faithfully executed," and explaining that the Governor is vested with "[t]he supreme executive power"); *see Austin v. State ex rel. Christian*, 310 So. 2d 289, 293 (Fla. 1975) (concluding that the Governor's statutory authority to order certain executive reassignments under Section 27.14, Florida Statutes, "should be broadly and liberally construed so as to complement and implement the duty of the Governor under the Constitution of the State of Florida to 'take care that the laws be faithfully executed'" (quoting Art. IV, § 1(a), Fla. Const.)).

In sum, Section 790.33(3)(e) does not address a purely or quintessentially legislative authority; it appertains, at most, to a power that is shared between the Executive Branch and only one part of the Legislature; and, far from encroaching on the powers of a coordinate branch, it may reasonably be construed to help effectuate the Governor's express constitutional duty to take care that the laws be faithfully executed. Taken together, those three considerations support the conclusion that the statute does not run afoul of the separation of powers.

In *Marcus v. Scott*, the court faulted Subsection (3)(e) because "[t]he Legislature may not *require* the Governor to exercise his constitutionally granted

suspension power against Plaintiffs, in the event that Plaintiffs are found to have committed a knowing and willful violation of state firearms regulation preemption by a court." No. 2012-CA-001260, 2014 WL 3797314, at *3 (Fla. 2d. Jud. Cir. June 2, 2014) (emphasis added). Respectfully, that determination was incorrect because the statute does not "require" the Governor to do anything. Rather, the statute provides that a knowing and willful violation of the preemption "shall *be cause* for termination." § 790.33(3)(e), Fla. Stat. (emphasis added). The mandatory language "shall" modifies the phrase "be cause," not the word "termination," thus giving the Governor the discretionary authority, but not the duty, to remove officials under the specified circumstances. *Cf. Pizzi v. Scott*, 160 So. 3d 897, 897 (Fla. 2014) (explaining that "the Governor has *discretion* to suspend [a] municipal officer from office until acquitted" (citing Art. IV, § 7(c), Fla. Const.) (emphasis added)).

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

Plaintiff Broward County ("Broward") claims that certain provisions of Section 790.33, Florida Statutes, unconstitutionally impair its employment contract with Broward County Administrator Bertha Henry. *Counties* Compl. ¶¶ 71-76. Specifically, Broward believes that the statute impairs certain terms of the agreement because the statute "empowers a third party, the Governor, to remove Ms. Henry from office" if she violates the statute, "effectively preclud[ing] Broward County from retaining its County Administrator at the pleasure of the Broward County

Commission." *Id.* ¶¶ 77-78. Broward also objects that "removal by the Governor would obligate Broward County to pay severance benefits" and that the statute "precludes Broward County from providing the contractually-required defense and indemnity to Ms. Henry in the event a claim is asserted against her." *Id.* ¶ 77. Broward's claim fails for several reasons.

As a threshold matter, Broward's claim is unripe and therefore must be dismissed. Assuming Broward's arguments are correct, no injury would accrue to the County or Ms. Henry until (1) Broward enacts a regulation in violation of Section 790.33, (2) Broward orders Ms. Henry to enforce that regulation, (3) Ms. Henry does so, (4) enforcement proceedings are brought against her, and (5) the Governor exercises his discretion to remove her from office. That hypothetical and speculative chain is insufficient to demonstrate any immediate threat of legal injury sufficient to establish standing for declaratory relief. *See State v. Fla. Consumer Action Network*, 830 So. 2d 148, 152 (Fla. 1st DCA 2002) ("While one may seek a declaration of his or her rights without an allegation of actual injury, an aggrieved party must nonetheless make some showing of a real threat of immediate injury, rather than a general, speculative fear of harm that may possibly occur at some time in the indefinite future.").

As to the merits of Broward's claims, insofar as Broward challenges the facial constitutionality of the statute, that claim "must fail" because Broward has not

carried its burden to prove that "no set of circumstances exists in which the statute can be constitutionally applied." *Cashatt v. State*, 873 So. 2d 430, 434 (Fla. 1st DCA 2004). Ms. Henry's contract, executed in 2008, is the only contract Broward has identified that predates the enactment of the challenged statute in 2011 and contains the contractual terms Broward alleges were modified by that enactment. *See Sears, Roebuck & Co. v. Forbes/cohen Fla. Properties, L.P.*, 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)). Thus, Broward's claim amounts to, at most, a challenge to the constitutionality of the statute as applied to Ms. Henry's contract.

Broward contends that, like Ms. Henry's contract, its county administrative code includes a provision requiring the county to defend or reimburse the legal expenses of county officials for claims arising from their official actions. *See Counties* Compl. ¶ 79; Broward Cty. Admin. Code § 18.45(b)(1). But the code expressly provides that the County is not obligated (in contract or otherwise) to defend or reimburse officials if "there is a substantial likelihood the Elected Official . . . will be found personally liable" or if doing so "would violate applicable law," *id.* § 18.45(b)(4), (g)(2), thus exempting the County of any obligation to defend officials accused of "a knowing and willful violation" of Section 790.33, Florida

Statutes, § 790.33(3)(d), Fla. Stat. Moreover, "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 465-66 (1985) (quoting *Dodge v. Bd. of Ed.*, 302 U.S. 74, 79 (1937)). Broward's argument therefore fails for the independent reason that there is no evidence that § 18.45(b)(1) was intended to contract away Broward's authority to change its indemnification policy.

Broward's challenge to the statute as applied to Ms. Henry's contract fares no better, as the statute simply does not modify the terms of the agreement. Broward first objects that, by empowering the Governor to remove Ms. Henry, the statute "effectively precludes Broward County from retaining its County Administrator at the pleasure of the Broward County Commission." *Id.* ¶¶ 77-78. However, like the parties to every agreement, neither Broward nor Ms. Henry had the authority to limit the current or future power of the Governor, who was not a party to the contract. Moreover, the contract expressly provides that Ms. Henry may "resign at any time from her position." Ex. A (Broward-002499 at -002502). Thus, the County retains

Ms. Henry "at its pleasure" only in the sense that she has no right to any particular term of employment, and Section 790.33 does not change that status quo.[14]

Broward next objects that "removal by the Governor would obligate Broward County to pay severance benefits." *Counties* Compl. ¶ 77. That is incorrect. The contract requires the County to pay severance benefits "[s]hould the Administrator be terminated during the term of this Agreement *without cause*." Ex. A (Broward-002499 at -002503) (emphasis added). To the extent the contract entitles Ms. Henry to severance benefits in the event that the Governor, rather than the County itself, terminates her employment, the agreement expressly provides that such benefits nevertheless are unavailable upon termination "for cause," *id.*, and that is precisely what the statute authorizes the Governor to do, *see* § 790.33(3)(e), Fla. Stat. ("A knowing and willful violation . . . shall be cause for termination of employment or contract or removal from office by the Governor."). On any reading of the contract, violation of state law plainly constitutes "cause" for termination. And nothing in the contract suggests that it anticipates removal for "cause" only by the County. Indeed,

[14] *Cf. Beta Eta House Corp. v. Gregory*, 230 So. 2d 495, 498 (Fla. 1st DCA), *modified sub nom. Beta Eta House Corp. v. Gregory*, 237 So. 2d 163 (Fla. 1970) ("The insured and the insurer cannot constitutionally contract away or postpone the speedy and adequate remedy the law affords a third party, nor impose unusual limitations upon the latter's right to jointly sue adverse parties."); *Breslow v. Baltuch*, 508 So. 2d 498, 499 (Fla. 3d DCA 1987) (holding that "child support payments . . . previously set by a property settlement agreement" were ineffective because "[t]he child is not a party to this contract, and the parties may not contract away his right to adequate support").

it would defy logic for the agreement to alleviate the County's responsibility for severance benefits if it *unilaterally* terminates Ms. Henry "for cause," but require payment where a third party, over which neither the County nor Ms. Henry has control, takes the same action.

Broward also contends that the statute "precludes Broward County from providing the contractually-required defense and indemnity to Ms. Henry in the event a claim is asserted against her." *Id.* ¶ 77. However, the contract expressly provides that both Broward and Ms. Henry "acknowledge and agree that . . . certain claims, actions, demands, losses and/or liabilities *may be precluded by law*." 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.* 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.[15] Moreover, because "the BOARD reserves the right to deny" Ms. Henry a defense,

[15] *See*, *e.g.*, *City of Charleston v. Public Service Comm'n of West Virginia*, 57 F.3d 385, 394 (4th Cir.1995) (holding that a state law did not impair a public contract when the contract expressly stated that its terms were subject to legislative regulations); *Transp. Workers Union of Am., Local 290 By & Through Fabio v. Se. Pennsylvania Transp. Auth.*, 145 F.3d 619, 624 (3d Cir. 1998) (same).

she has no enforceable right modified by the challenged statute. *See State ex rel. Simmons v. Harris*, 161 So. 374, 378-79 (Fla. 1935) ("[I]n the constitutional sense," the obligation of a contract "is the means provided by law by which it can be enforced."); *Fla. Dep't of Health & Rehab. Servs. v. S. Energy, Ltd.*, 493 So. 2d 1082, 1084 (Fla. 1st DCA 1986) (recognizing that a "subject to appropriation" contract provision created a contingent right of termination).

Finally, even if the challenged provisions *did* modify the terms of Ms. Henry's contract, they are not unconstitutional as applied to that agreement 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). As discussed more fully above, the important public purpose served by the statute is the enforcement of the decades-old decision of Florida's duly elected representatives that the regulation of firearms and ammunition must be uniform and therefore must be decided 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 if (a) Broward directs her to violate the preemption statute, which predates the

contract by more than 30 years, and (b) Ms. Henry carries out that directive "knowing" that she will be in violation of state law.

VII. Section 790.33, Florida Statutes Does Not Violate Free Speech Or Assembly Rights.

Plaintiffs claim that the challenged provisions violate their free speech and assembly rights by prohibiting them from "express[ing] their views in favor of preempted or arguably preempted gun violence prevention measures" and from "freely associat[ing] and express[ing] solidarity with constituents in favor of" such proposals. *Daley* Compl. ¶¶ 109, 99-100. Specifically, Plaintiffs contend that Section 790.33(3)(f) is unconstitutional because it prohibits not only the 'enactment' or 'enforcement' of preempted regulations, but also the 'promulgation' of such regulations, which, Plaintiffs contend, may include not only the regulation of firearms but also mere "advoca[cy] on behalf of particular public policies." *Weston* Compl. ¶ 86. Plaintiffs are mistaken. As discussed above, the First DCA has held that the statute prohibits only "the enactment or enforcement of firearms regulations," *Fla. Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, 461 (Fla. 1st DCA 2017), and that the term 'promulgated,' "as the term is used in section 790.33(3)(f)," means "enacted," *id.* at 464-65.

To the extent Plaintiffs believe that the statute violates the free speech rights of local officials because it restricts what ordinances they may enact or enforce, that argument fails because the enactment and enforcement of ordinances is non-

expressive conduct, not First Amendment speech. As the Supreme Court of the United States has explained, "the act of voting symbolizes nothing. It *discloses*, to be sure, that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication." *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126-27 (2011) (emphasis in original). "Moreover, the fact that a nonsymbolic act is the product of deeply held personal belief—even if the actor would like it to *convey* his deeply held personal belief—does not transform action into First Amendment speech." *Id.* at 127 (emphasis in original). In other words, "a legislator has no right to use official powers for expressive purposes." *Id.* As for the local government Plaintiffs, the First Amendment likewise "confers [no] right to use governmental mechanics to convey a message." *Id.*[16]

VIII. Section 790.33, Florida Statutes Does Not Violate Constituents' Right To Petition And Instruct Their Representatives.

Plaintiffs allege that the penalty provisions violate Article I, § 5 of the Florida Constitution by "rendering illusory the rights of [constituents] to petition and instruct

[16] To the extent that the *Weston* Plaintiffs claim that the statute violates the free speech rights of private citizens because it chills them from communicating with officials regarding firearms regulations, *Weston* Compl. ¶ 89, that claim fails because the statute does not regulate the speech or expressive conduct of private citizens. Again, "the First Amendment confers [no] right to use governmental mechanics to convey a message." *Nev. Comm'n on Ethics*, 564 U.S. at 127.

their elected representatives." *Weston* Compl. ¶ 111. Plaintiffs say they "are not alleging that local residents are entitled to have laws enforced that are inconsistent with or preempted by state statute." *Id.* ¶ 119. "However, it *is* the Plaintiffs' contention that local constituencies have a constitutional right to petition their democratically elected local officials and invoke their assistance in enacting local legislation, even if that legislation is ultimately determined to be unenforceable and merely symbolic." *Id.*

Defendants agree that citizens have a right "to petition their democratically elected local officials and invoke their assistance in enacting local legislation." *Id.* ¶ 119. That right protects and promotes dialogue between citizens and government by "allowing citizens to express their ideas, hopes, and concerns to their government and their elected representatives." *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379, 388 (2011). And, to be sure, that right would be abridged by a statute that penalizes *constituents* for petitioning activity. *See Curry v. State*, 811 So. 2d 736, 743 (Fla. 4th DCA 2002). But Section 790.33 does nothing of the sort. The statute solely penalizes *officials* for taking official action preempted by the statute, leaving intact citizens' rights to discuss and promote whatever proposals they prefer. The statute, moreover, encourages local officials to hear their constituents' concerns and promote them at the State level. *See* § 790.33(2), Fla. Stat.

As Plaintiffs concede, "the right of free speech and the right to petition 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."). And Plaintiffs are mistaken to the extent they suggest that the right to petition protects constituents' interest in achieving a symbolic, if not legally effective, official act as a result of lobbying their representatives. *See Nev. Comm'n on Ethics*, 564 U.S. at 127.

IX. 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, "[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 Legislature followed precisely this course in Section 790.33(3)(b).

When the Legislature creates a statutory cause of action, "the legislature is master of the elements and boundaries on the new cause of action," including whether to modify otherwise applicable "common law remedies." *Comptech Int'l, Inc. v. Milam Commerce Park, Ltd.*, 753 So. 2d 1219, 1223 (Fla. 1999), *receded from on other grounds by Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Companies, Inc.*, 110 So. 3d 399, 407 (Fla. 2013). As the Florida Supreme Court has explained, "[i]f the courts limit or abrogate such legislative enactments through judicial policies, separation of powers issues are created, and that tension must be resolved in favor of the Legislature's right to act in this area." *Id.* at 1222; *see Bared & Co. v. Landis & Gyr Powers, Inc.*, 650 So. 2d 633, 633-34 (Fla. 3d DCA 1995) (holding that statute establishing "remedies of accounting, injunction, and attachment" was not "invalidly in conflict with any rule of civil procedure").

X. Plaintiffs' Request For A Declaration That Certain Proposed Regulations Are Consistent With The Challenged Provisions.

In addition to their constitutional challenges, the County Plaintiffs seek a declaratory judgment that certain regulations they wish to enact and enforce are, in any event, consistent with the challenged provisions and therefore lawful.

Section 790.33 prohibits the "regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof." § 790.33(1), (3). Such regulation includes all local government action taken in a regulatory capacity with the purpose and effect

of restricting firearms and ammunition, with certain enumerated exceptions. Local regulation of firearm "components" and "accessories," for example, is prohibited. *See supra* Section II.A (discussing firearm "components); *infra* Section X.C (discussing firearm "accessories"). Local government action taken in a *proprietary* capacity, such as leasing local government property and facilities, is not prohibited. *See supra* Section II.A; *infra* Section X.A.

With certain enumerated exceptions, Section 790.335 prohibits state agencies and local governments from keeping "any list, record, or registry of privately owned firearms or any list, record, or registry of the owners of those firearms." § 790.335(2), Fla. Stat.

A. Count VIII

The County Plaintiffs seek a declaration that they may "take action in the Counties' capacity as proprietors to restrict firearms, ammunition, and gun shows from County-owned or County operated facilities and locations, including, but not limited to, the Broward County Convention Center, Miami-Dade County Auditorium," and other such locations. *Counties* Compl. ¶ 149.

As discussed above, *see supra* Section II.A, actions taken in a purely *proprietary* capacity, such as leasing (or declining to lease) county-owned properties or facilities to a particular individual or business, are not "regulation" in any sense of the term. Such actions therefore fall outside the statute's ambit. To the extent

Plaintiffs seek to enact an ordinance providing that "firearms and ammunition, including any components thereof, shall be prohibited on any property or facility owned or operated by" them, *see Counties* Compl. Ex. A § 18-100, such ordinance would be a preempted exercise of *regulatory* authority.

B. Count IX

The County Plaintiffs seek a declaration that they may "enact regulation precluding firearms on a year-round basis (or the greatest extent otherwise permitted under the Firearms Preemption) 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. Section 790.06(12)(a), Florida Statutes prohibits the concealed or open carry of firearms in certain locations (*e.g.*, any "police, sheriff, or highway patrol station" and any "courthouse"), irrespective of whether a person is otherwise licensed to carry a firearm. The County Plaintiffs seek to enact and enforce local regulations parallel to the statutory scheme.

County and municipal police are not only free but indeed *required* to enforce the State's criminal laws, including Section 790.06(12)(a). However, Section 790.33 expressly declares the Legislature's "occup[ation of] the *whole field* of regulation of firearms and ammunition," § 790.33(1), Fla. Stat. (emphasis added), and field preemption statutes, like Section 790.33, 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). The County Plaintiffs' proposed regulations are therefore preempted.

C. Count X

The County Plaintiffs seek a declaration that they "are entitled to regulate accessories and other items related to firearms or ammunition but not inherent in the initial purchase of firearms, such as speed loaders and large capacity magazines." *Counties* Compl. ¶ 164. As discussed above, however, the only question under Section 790.33(1) is whether the county's proposed action comprises "regulation of firearms or ammunition." If so, the action is preempted. In considering whether an ordinance regulating "accessories and other items related to firearms or ammunition" is preempted, *Counties* Compl. ¶ 164, the appropriate test is whether the *purpose* of the ordinance is to "regulat[e] . . . firearms [or] ammunition," including by restricting "the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, [or] transportation thereof." § 790.33(1), Fla. Stat.

Such a test is consistent with, and indeed expressly contemplated by, the statutory scheme. Section 790.33 creates several exceptions to the preemption, including for "[z]oning ordinances that encompass firearms businesses along with other businesses, except that zoning ordinances that are *designed for the purpose of* restricting or prohibiting . . . [or] as a method of regulating firearms or ammunition are in conflict with this subsection and are prohibited." § 790.33(4)(a), Fla. Stat. (emphasis added). In other words, a regulation that is neutral as to firearms is lawful, and the regulation's *purpose* is determinative of its neutrality.

The regulations proposed by the counties—restrictions on speed loaders and large capacity magazines—plainly have the purpose of regulating firearms and ammunition by limiting the ways in which they may be possessed and used. Indeed, because such devices have no use independent of their effect on firearms and ammunition, restrictions on such devices have no purpose other than to restrict the use of firearms and ammunition. Such restrictions are therefore preempted.

D. 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." The County Plaintiffs allege that unless they "can require that firearm sellers maintain documentation demonstrating

compliance with the five-day waiting period and the criminal history records check requirement, the Counties permitted regulation under the Local Option Provision cannot be effectively enforced." *Counties* Compl. ¶ 141.

Defendants agree that Article VIII, Section 5(b) exempts counties from the challenged statutes to the extent they seek to require a waiting period and background check that adheres to the limits of the constitutional exception.[17] It is also clear that, to enforce such requirements, counties must be free to require sellers to prove their compliance. Defendants therefore agree that, to the extent proof requirements are *strictly necessary* to enforce the counties' waiting period and background check provisions, those additional requirements, too, are lawful.

Specifically, Defendants agree that counties may require sellers to keep "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."

[17] Conversely, to the extent such requirements exceed what is expressly allowed by Article VIII, Section 5(b), they are in violation of Section 790.33. It is immaterial whether such requirements are "consistent with newly amended Section 790.065, Florida Statutes." As discussed above, the statute preempts not only local regulations that are inconsistent with state law, but the *entire field* of the regulation of firearms and ammunition. Thus, the counties' request for a declaration that they may require "the completion of criminal history records checks prior to the purchase of firearms from any licensed importer, licensed manufacturer, or licensed dealer, *regardless of the location of the sale*," must be denied. *Counties* Compl. ¶ 139 (emphasis added).

Counties Compl. ¶ 139. And some of the Counties' proposals are not regulations at all and, therefore, are lawful. For example, posting "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, are not "regulations of firearms and ammunition."

The other requirements Plaintiffs seek to impose, however, are illegal because they are not strictly necessary to enforce provisions allowed by Article VIII, Section 5(b) of the Florida Constitution. Specifically, "[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, are unnecessary in light of a requirement that sellers maintain verifiable documentation of their compliance. Such additional requirements would therefore be preempted firearms regulations in violation by Section 790.33(3)(a), Florida Statutes. They would also violate Section 790.335(3)(e), Florida Statutes, which prohibits the creation and maintenance of lists and records of privately owned firearms and their owners. Similarly, a local ordinance requiring mandatory reporting of failed background checks would be a preempted regulation of the sale of firearms.

XI. These Actions Must Be Dismissed For Lack Of A Justiciable Case Or Controversy.

As discussed more fully in Defendants' Motion to Dismiss briefing, these actions must be dismissed for lack of a justiciable case or controversy because the State of Florida, the Attorney General, the FDLE Commissioner, and the Commissioner of Agriculture are improper defendants. Moreover, Plaintiffs lack standing because (1) local governments and their officials are barred from challenging legislation affecting their duties, and (2) Plaintiffs have not identified a single instance in which Defendants have enforced or threatened to enforce the statutes against Plaintiffs or anyone else. The *Weston* and *Miami-Dade County* Plaintiffs lack standing for the additional reason that they allege "merely the possibility" that they will enact local regulations prohibited by Section 790.33, Florida Statutes.

"[W]here the case proceeds to summary judgment . . . , standing is evaluated not on the pleadings alone but on the basis of all the evidence in the record. At this stage, the plaintiff must do more than plead standing; he must prove it." *Glover River Org. v. U.S. Dep't of Interior*, 675 F.2d 251, 254 n.3 (10th Cir. 1982) (citing *Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n.31 (1979)). Plaintiffs have failed to carry that burden. Specifically, they have produced no evidence that Defendants have enforced or threatened to enforce the statutes against them or anyone else, Indeed, Plaintiffs' witnesses testified that they are unaware of any such threats or

enforcement. *See*, *e.g.*, Ex. B (J. Perez Dep. at 16:5-16:21 (Dec. 11, 2018)); Ex. C (L. Henderson Dep. at 18:21-19:2 (Dec. 12, 2018)); Ex. D (C. Dodge Dep. at 16:2-17:20 (Dec. 11, 2018)); Ex. E (M. Ramos Dep. at 14:5-14:12 (Dec. 12, 2018)).

Moreover, the evidence shows that the Office of the Attorney General has consistently maintained that the Attorney General is not responsible for enforcing the statute. *See* Ex. F (e-mail from S. Daniel to D. St. Cloud (June 11, 2018) ("Please be advised that the Office of the Attorney General (OAG) does not have enforcement authority over the issue you raise in your email."); Ex. G (e-mail from S. Daniel to K. Bates (June 6, 2018) (same)); Ex. H (e-mail from S. Daniel to M. Golumb (June 4, 2018) (same)); Ex. I (e-mail from S. Daniel to P. Upfield (Jan. 30, 2018) (same)); Ex. J (e-mail from S. Daniel to R. Thornton (Nov. 1, 2017) (same)).

The *Weston* and *Miami-Dade County* Plaintiffs, moreover, have produced no evidence that, but for the challenged statutes, they would enact or enforce local regulations within the scope of those provisions. Accordingly, Defendants are entitled to summary judgment.

CONCLUSION

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

Respectfully submitted on this 21st day of February, 2019,

ASHLEY MOODY
ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I hereby certify that the undersigned electronically filed the foregoing with the Clerk of the Courts on February 21, 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

APPENDIX TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

PREVIOUS ITEM

BROWARD COUNTY
BOARD OF COUNTY COMMISSIONERS

NEXT ITEM

BROWARD COUNTY FLORIDA

AGENDA ITEM #9

Meeting Date
10/07/08

Requested Action	(Identify appropriate Action or Motion, Authority or Requirement for Item and identify the outcome and/or purpose of item.)

MOTION TO APPROVE: Agreement between Broward County and Bertha W. Henry for Employment as the Broward County Administrator.

Why Action is Necessary:

What Action Accomplishes:

Is this Action Goal Related? ☐ **Yes** ☐ **No**

Summary Explanation/Background	(The first sentence includes the Agency recommendation. Provide an executive summary of the action that gives an overview of the relevant details for the item. Identify how item meets Commission Challenge Goal.)

Fiscal Impact/Cost Summary	(Include projected cost, approved budget amount and account number, source of funds, and any future funding requirements.)

Exhibits Attached (copies of original agreements)	(Please number exhibits consecutively.)

Exhibit I. Agreement between Broward County and Bertha W. Henry for Employment as the Broward County Administrator

Commission Action

Authorized Signature (Signature confirms that required approvals from other agencies have been received – e.g. Purchasing, Budget, Risk Mgmt, Attorney)	**Scheduling** County Admin initials
Signature: E. A. Lukic **Date:** 9/25/08 **Type: Name, Title, Agency, and Phone** Evan A. Lukic, County Auditor 954-357-7590	
Source of additional information: Type Name, Agency, and Phone	

Form 107-1-A Revised 12/09/03

EXHIBIT A

AGREEMENT

Between

BROWARD COUNTY

and

BERTHA HENRY

for

EMPLOYMENT AS COUNTY ADMINISTRATOR

AGREEMENT

Between

BROWARD COUNTY

and

BERTHA HENRY

for

EMPLOYMENT AS COUNTY ADMINISTRATOR

This Agreement is made and entered into by and between Broward County, a political subdivision of the state of Florida, through its Board of County Commissioners, hereinafter referred to as BOARD, and Bertha Henry, hereinafter sometimes referred to as ADMINISTRATOR.

WHEREAS, BOARD is desirous of appointing Bertha Henry as its County Administrator; and

WHEREAS, Bertha Henry has indicated a willingness to accept the responsibilities and render specific performance to BOARD as its County Administrator; and

WHEREAS, both parties have determined that it would be mutually beneficial to have a contract between them, setting forth the agreements and understandings which provide inducement for Bertha Henry to serve as the County Administrator;

NOW, THEREFORE, in consideration of the mutual covenants and promises, which the parties set forth below, BOARD and ADMINISTRATOR agree as follows:

ARTICLE 1
APPOINTMENT OF COUNTY ADMINISTRATOR

BOARD hereby appoints Bertha Henry as County Administrator, and Bertha Henry hereby accepts such appointment upon the terms and conditions hereinafter set forth.

ARTICLE 2
TERM

2.1 ADMINISTRATOR's appointment shall commence on October 7, 2008.

2.2 This Agreement shall continue unless terminated by either party.

2.3 Regardless of any other provision in this Agreement, ADMINISTRATOR understands and acknowledges that the position of County Administrator is an at-will position which is exempt from accruing or receiving property rights, other than set forth in this Agreement, and that the County Administrator serves at the pleasure of the BOARD. Nothing within this Agreement shall prevent, limit, or otherwise interfere with the right of BOARD to revoke the appointment of ADMINISTRATOR without cause at any time subject to ADMINISTRATOR's contract rights hereunder. ADMINISTRATOR hereby waives any rights she may have, pursuant to Florida Statutes, or any other applicable federal, county or local law now in effect or subsequently adopted, to any prescribed notice or hearing prior to termination.

2.4 Nothing within this Agreement shall prevent, limit, or otherwise interfere with the right of ADMINISTRATOR to resign at any time from her position; provided, however, that ADMINISTRATOR shall give BOARD written notice at least sixty (60) days prior to the effective date of such resignation.

ARTICLE 3
SEVERANCE PROVISIONS

3.1 Should the ADMINISTRATOR be terminated during the term of this Agreement without cause, ADMINISTRATOR shall be entitled to receive a severance package (hereinafter referred to as the "Severance Package") equivalent to the compensation ADMINISTRATOR would have earned for a period of One Hundred Eighty (180) days. The foregoing shall survive the expiration or termination of this Agreement. For purposes of the Severance Package, compensation shall be limited to the following:

- Salary (based on current annual base salary as of the date of separation);
- Deferred compensation payments payable by Broward County, if any;
- Annual and sick accrual and payout consistent with County Policy;
- An amount equal to the value of the County's contribution to ADMINISTRATOR's health insurance plan for the tier of coverage selected as of the date of separation, or if no coverage is selected, the amount available to employees who waive health insurance coverage.

3.2 As a precondition to Broward County's obligation to pay or to comply with its Severance Package obligation, ADMINISTRATOR shall deliver to BOARD a signed, valid and enforceable waiver of all of her rights under the Age Discrimination in Employment Act of 1967, as amended, (hereinafter referred to as the "ADEA"). As provided by the ADEA, ADMINISTRATOR shall be given at least twenty-one (21) days to consider the written waiver of her rights under the ADEA and an additional

seven (7) days to revoke the waiver after signing it. ADMINISTRATOR shall include a separate general release in the ADEA waiver document which fully and finally holds harmless and discharges BOARD, Broward County, its current and former officers, officials, agents, servants, and employees, in both their official and individual capacities, from all liability relative to the termination of her employment. Upon receiving the required waiver and the general release, and subject to ADMINISTRATOR's compliance with all other prerequisites upon her, Broward County shall comply with its obligation to provide ADMINISTRATOR the Severance Package no later than fourteen (14) days after expiration of the seven (7) day ADEA revocation period; provided, however, that neither the waiver nor the general release has been revoked.

3.3 ADMINISTRATOR shall not receive any Severance Package should ADMINISTRATOR voluntarily resign or should ADMINISTRATOR's appointment be revoked for cause or upon ADMINISTRATOR's conviction of a felony or any crime involving moral turpitude, including those where adjudication is withheld.

3.4 In the event the BOARD at any time during the time of this Agreement reduces the salary or benefits of ADMINISTRATOR in a greater percentage than applicable across-the-board reduction of all County employees or in the event the BOARD fails following written notice to comply with any other material provision benefiting ADMINISTRATOR, or if ADMINISTRATOR resigns following a motion approved by a majority of the BOARD, that she resign, ADMINISTRATOR may at her option and upon written notice from her to the Board of her resignation, given within thirty (30)

days of the effective date of such action or failure, be deemed to be dismissed without cause and shall receive as severance benefits a lump sum cash payment in accordance with Section 3.1 herein. The lump sum cash payment will be paid to the ADMINISTRATOR within fifteen (15) days of the date of receipt by COUNTY of the release required by Section 3.2 of this Agreement.

3.5 In the event the position of County Administrator (change in title only not included) is eliminated from the Broward County Charter, or her compensation is reduced by more than 25% as a result of a change in the Broward County Charter and she elects to resign her position because of said reduction within thirty (30) days of the effective date of said reduction, the ADMINISTRATOR will be entitled to the compensation as outlined in Section 3.1 of this Agreement. The lump sum case payment will be paid to the ADMINISTRATOR within fifteen (15) days of the date of receipt COUNTY of the release required by Section 3.2 of this Agreement.

ARTICLE 4
SALARY

4.1 ADMINISTRATOR shall be paid an initial annual base salary of Two Hundred Ninety Thousand Dollars ($290,000), payable in equal bi-weekly installments in accordance with Broward County policy.

4.2 ADMINISTRATOR shall receive one-twenty-sixth ($1/26^{th}$) of the maximum annual amount of public-employee deferred compensation allowed under Internal Revenue Service Regulations for deferred compensation for each bi-weekly period for which the ADMINISTRATOR is employed by the BOARD, which shall be paid into an approved Broward County deferred compensation plan as selected by

ADMINISTRATOR. Such deferred compensation shall be paid in equal bi-weekly installments in accordance with Broward County policy. In no event shall the payment of deferred compensation by the BOARD exceed the maximum allowed under Internal Revenue Service Regulations.

4.3 ADMINISTRATOR's annual compensation may be adjusted at the discretion of BOARD at an official BOARD meeting. The parties anticipate that ADMINISTRATOR's increases in compensation, if any, will be made on a fiscal-year basis, on or about the time of ADMINISTRATOR's performance review as provided in Article 5. The ADMINISTRATOR's salary and other contract terms shall be reviewed in light of ADMINISTRATOR's evaluation.

ARTICLE 5
PERFORMANCE AND EVALUATIONS

5.1 ADMINISTRATOR's review and performance shall be conducted annually in accordance with performance review criteria established by the BOARD.

5.2 Annual evaluations will be conducted on or about October of each year, beginning October 2009. Said evaluations shall be in accordance with management criteria and goals and objectives developed by the BOARD in consultation with the ADMINISTRATOR.

ARTICLE 6
DUTIES

6.1 ADMINISTRATOR shall, to the best of her ability, perform all duties imposed on her as the County Administrator of Broward County in the Broward County Charter,

applicable laws, ordinances, and regulations, and such other legally permissible and proper duties as she may be directed to perform by the BOARD.

6.2 ADMINISTRATOR agrees to perform the functions of her office in a competent and professional manner.

6.3 ADMINISTRATOR agrees to refrain from acting in any other work capacity or employment which would restrict her ability, to devote her full time to employment as County Administrator, to faithfully perform the duties and work of the Office of the County Administrator, and at all times to work in the interest and furtherance of the general business of the Charter government of Broward County, Florida.

ARTICLE 7
BENEFITS AND REQUIREMENTS

7.1 Except as expressly provided in this Agreement, all other provisions of law, rules, and regulations of Broward County, relating to annual leave, sick leave, retirement and pension system contributions, holidays and other fringe benefits and working conditions as they now exist or hereafter may be amended shall apply to ADMINISTRATOR as they would to other Broward County Executive Team ("Executive Team") employees.

7.2 ADMINISTRATOR is required to use an automobile from time to time in performing the business of Broward County and it is required that ADMINISTRATOR provide and maintain an automobile for such duties in accordance with the following:

7.2.1 BOARD shall provide ADMINISTRATOR an automobile allowance in the gross amount of Six Hundred Dollars ($600.00) per month toward the expenses of acquiring, maintaining, and using a vehicle for County business.

In addition, auto travel outside the tri-county area (Miami-Dade, Broward, and Palm Beach Counties) will be reimbursed according to Broward County policy. The allowance will be adjusted annually, on October 1st, using the Miami-Fort Lauderdale Consumer Price Index-All Urban Consumers.

7.2.2 ADMINISTRATOR shall procure and maintain a policy of automobile insurance acceptable to Broward County with limits of no less than One Hundred Thousand Dollars ($100,000) per person and Three Hundred Thousand Dollars ($300,000) per occurrence for bodily injury liability, and One Hundred Thousand Dollars ($100,000) for property damage. A copy of a current policy plus any amendments thereto shall be kept on file with Broward County at all times during the term of this Agreement.

7.3 When eligible, ADMINISTRATOR shall have access to Broward County's cafeteria plan of optional employee benefits, which currently include options such as health, life, disability, cancer, and dental insurance, and receive all applicable County funding contributions on the same basis as approved by the County for all other Executive Team employees.

7.4 BOARD agrees to maintain the ADMINISTRATOR's Senior Executive Management Service Class of the Florida Retirement System with its contribution.

7.5 In accordance with and as allowed by state law and County policy, Broward County shall pay reasonable professional dues and subscriptions of ADMINISTRATOR for her participation in national, regional, state, and local associations, and

organizations necessary and desirable for her continued professional development and for the benefit of the County.

7.6 In accordance with and as allowed by state law, County ordinances and County policy, BOARD shall pay the expenses of the ADMINISTRATOR while on County business or while attending functions as the representative of or on behalf of the County, or while attending national, regional, state, and local association meetings, short courses, institutes, and seminars that are necessary for her professional development and for the benefit of the County.

7.7 BOARD shall bear the full cost of any fidelity or other bonds required of ADMINISTRATOR pursuant to any law or ordinance.

7.8 ADMINISTRATOR shall maintain residency within the geographical boundaries of Broward County, Florida, during the period of her appointment as ADMINISTRATOR.

7.9 BOARD agrees to make available to ADMINISTRATOR such other benefits that are not specifically covered by this Agreement as they now exist or may exist in the future, and may be amended from time to time, on the same basis as other Executive Team employees. These benefits will include, but not be limited to, retirement and pension system contributions, cafeteria plan options, sick leave, holidays, and other fringe benefits.

ARTICLE 8
SEVERABILITY

8.1 If any provision or any portion thereof contained in this Agreement is held to be unconstitutional, invalid, or unenforceable, the remainder of this Agreement or

portion thereof shall be deemed severable, shall not be affected, and shall remain in full force and effect.

ARTICLE 9
ENTIRE AGREEMENT

9.1 ADMINISTRATOR and BOARD acknowledge and agree that this Agreement constitutes their final understanding and agreement with respect to the subject matter hereof, and supersedes all prior or contemporaneous negotiations, promises, covenants, agreements, or representations concerning all matters directly or indirectly, or collaterally related to the subject matter of this Agreement.

9.2 ADMINISTRATOR and BOARD acknowledge, understand, and agree that nothing within this Agreement can be modified, amended, or revoked except by and with the express written consent of both ADMINISTRATOR and BOARD.

ARTICLE 10
HEADINGS

10.1 The headings of the Articles of this Agreement are inserted only for purposes of convenience and reference and shall in no way restrict or otherwise affect the construction of the terms and conditions herein.

ARTICLE 11
RULES OF CONSTRUCTION

11.1 For purpose of any construction of the intent of this Agreement, the parties intend that no party be deemed or characterized as the drafter, and that construction occur without regard to any canons of construction concerning the drafter.

ARTICLE 12
ACKNOWLEDGMENT

12.1 The BOARD and ADMINISTRATOR hereby irrevocably submit to the jurisdiction of the Florida state courts or the United States District Court, Southern District of Florida, in any action or proceeding arising out of or relating to this Agreement and irrevocably agrees that venue for any dispute arising under this Agreement shall be exclusively in the state court located in Broward County, Florida, or in the United States District Court, Southern District of Florida. This Agreement shall be construed by and controlled under the laws of the State of Florida.

ARTICLE 13
ACKNOWLEDGMENT

13.1 ADMINISTRATOR hereby acknowledges that she was provided with this Agreement prior to its execution, and that she had the time and opportunity to review the Agreement and provide comment prior to her execution of this Agreement. ADMINISTRATOR agrees that she has had an opportunity to consult with an attorney of her choice on the terms and conditions of this Agreement and has had an opportunity to clarify any terms and conditions which were not understood by her. ADMINISTRATOR further acknowledges that she has read this Agreement; and by her signature below acknowledges that she fully understands and agrees to the contents, terms, and conditions of this Agreement.

ARTICLE I4
INDEMNIFICATION

14.1 The BOARD shall defend, hold harmless and indemnify the ADMINISTRATOR against and from any and all claims, legal or administrative actions or demands,

consistent with the provisions of Section 768.28, Florida Statutes, as amended, including actions for equitable relief whether groundless or otherwise, including attorney's fees and costs, arising from any act or omission either alleged or real, which occur or occurred during her employment and performance of her duties as ADMINISTRATOR. The BOARD may compromise and settle any claim or suit and pay the amount of any settlement or judgment rendered thereon, together with attorney's fees associated therewith. The ADMINISTRATOR shall cooperate fully in the defense, compromise, or settlement of any claims, actions, or demands which BOARD defends, holds her harmless, or indemnifies her. Any unreasonable failure by ADMINISTRATOR to provide full information or to cooperate with BOARD's attorneys shall be cause for BOARD to deny ADMINISTRATOR the defense, hold harmless and/or indemnification rights under this Article. BOARD and ADMINISTRATOR acknowledge and agree that even though BOARD may proceed to handle a claim, action, or demand against ADMINISTRATOR, certain claims, actions, demands, losses, and/or liabilities may be precluded by law or may not be covered by the terms of this Article; therefore, 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 fees, at a later date based on the inapplicability of lack of coverage under this Article. The obligations of this paragraph shall survive the termination of this Agreement however terminated.

(The remainder of this page is intentionally left blank.)

IN WITNESS WHEREOF, the parties have made and executed this AGREEMENT on the respective dates under each signature: BROWARD COUNTY through its BOARD OF COUNTY COMMISSIONERS, signing by and through its Mayor or Vice-Mayor, authorized to execute same by Board action on the 7th day of October, 2008, and Bertha Henry.

BOARD

WITNESSES:

BROWARD COUNTY, by and through its Board of County Commissioners

By _____
Mayor

7th day of October, 2008

MARY ANNE DARLEY
Print or type name

GLORINDO AJONGON
Print or type name

Approved as to form by
Office of County Attorney
Broward County, Florida
JEFFREY J. NEWTON, County Attorney
Governmental Center, Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: (954) 357-7600
Telecopier: (954) 357-7641

By _____ 10-2-08
Larry E. Lymas-Johnson
Deputy County Attorney

AGREEMENT BETWEEN BROWARD COUNTY AND BERTHA HENRY FOR EMPLOYMENT AS COUNTY ADMINISTRATOR

ADMINISTRATOR

WITNESSES:

D E Sawey

DARLING SEWELL
Print or type name

Liana Ravello

LIANA RAVELLO
Print or type name

By Bertha Henry
Bertha Henry

2nd day of October, 2008

LEL:dp
HenryBertha Agmt. (10-2-08).a01
10/2/08
#08-014.02

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA
CASE NO. 2018-CA-000882

BROWARD COUNTY, ET AL.,

Plaintiff,

vs.

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

Defendant.
_____/

Weiss Serota Helfman Cole & Bierman
200 East Broward Boulevard, Ste 1900
Ft. Lauderdale, Florida 33301
Tuesday, December 11, 2018
1:08 P.M.

DEPOSITION OF
DIRECTOR JUAN PEREZ

Taken before IRIS GONZALEZ, Court Reporter and Notary Public in and for Miami-Dade County, State of Florida at Large.

EXHIBIT
B

APPEARANCES:

TIMOTHY L. NEWHALL, ESQ.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
On behalf of Defendants, State of Florida, Bondi, Putnam, Swearingen, Norman and Patronis

ALTANESE PHENELUS, ESQ.
Stephen P. Clark Center
111 NW First Street, Suite 2810
Miami, Florida 33128
On behalf of Miami-Dade County

SHANIKA A. GRAVES, ESQ.
Stephen P. Clark Center
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Miami, Florida 33128
On behalf of Miami-Dade County

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Everytown
132 E. 43rd Street, #657
New York, New York 10017
On behalf of Plaintiff, Daley

ERIC MENDEZ
Miami-Dade Police Department
Chief of Staff
7707 SW 117th Avenue
Miami, Florida 33183

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Proskauer Rose LLP
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New York, New York 10036
On behalf of Plaintiff Daley

ADAM M. HAPNER, ESQ.
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Ft. Lauderdale, Florida 33301
On behalf of Plaintiff, Western

JAMIE A. COLE, ESQ.
Weiss Serota Helfman Cole & Bierman
200 East Broward Boulevard, Ste 1900
Ft. Lauderdale, Florida 33301
On behalf of Plaintiff, Western

I N D E X

EXHIBITS

THE WITNESS: Repeat it again.
BY MR. NEWHALL:
Q. Yeah, I don't blame you. To your knowledge has Miami-Dade County been made a party to any litigation since July of 2011 by anyone who claims that any firearms ordinances on its books violate state law?
A. Not to my recollection.
Q. Are you familiar with the organization known as Florida Carry?
A. I've heard of them.
Q. In fact, they -- I'll be careful how I say this. They've sued several organizations or several municipalities and perhaps counties in the state. Have they, to your knowledge, brought any claims or actions against Miami-Dade County?
A. I do not have that knowledge.
Q. Do you know if any private individuals or entities have threatened Miami-Dade County with any type of enforcement action under Section 790.33, Florida Statutes since July of 2011?
A. I don't have personal knowledge of any of those.
Q. As Director of the Miami-Dade County Police Department, I'm going to sort as an

equivalent of the County Sheriff, would you be familiar with any lawsuits challenging a firearm regulation or not necessarily?

A. Not necessarily.

Q. To your knowledge, sir, have any agencies or officials of the State of Florida made any threats of enforcement action against Miami-Dade County since July of 2011 in any way concerning firearm regulations?

A. I do not have personal knowledge of that.

Q. Have you personally had any conversations with any representatives of any state agencies or any state officials concerning what Miami-Dade County perhaps could do or could not do in the field of firearm regulations?

A. I have not.

Q. To your knowledge has the Mayor or any of the Commissioners of the Miami-Dade County Commission had any such conversations with any representatives of the state or any state agency?

A. I do not have that knowledge.

Q. Have you personally had any conversations with any private citizens in Miami-Dade County who have in any way suggested that, you know, perhaps somebody should bring any kind of enforcement action

under Section 790.33, Florida Statutes?

A. I have not.

MS. PHENELUS: Objection, form.

BY MR. NEWHALL:

Q. As a part of your preparations for this deposition reviewed the Amended Complaint that's been filed on behalf of Broward and Miami-Dade Counties in this case?

A. Yes, I have.

Q. I'm going to ask you a few questions that come out of the concerning allegations that are made in the complaint. We may just to pass this back and forth because I only have one copy of it.

A. Sure.

Q. I'm going to direct you to paragraph 18 of the Amended Complaint which I have on, I think begins on page 7, bottom and I have made some circles and some underlining here, but there's no writing and certainly nothing that --

A. Where are we starting?

Q. Right there.

A. Number 18?

Q. Yes.

A. Okay.

Q. Paragraph 18 suggests that the Miami-Dade

CERTIFICATE OF OATH

THE STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

I, the undersigned authority, certify that DIRECTOR JUAN PEREZ personally appeared before me and was duly sworn.

WITNESS my hand and official seal this 11th day of December, 2018.

IRIS GONZALEZ, REPORTER
Notary Public - State of Florida
Commission # GG 244952
Expires: 8-23-2022

TRANSCRIPT CERTIFICATE

STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

I, IRIS GONZALEZ, Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 28th day of December, 2018.

IRIS GONZALEZ, REPORTER
Notary Public

VERITEXT LEGAL SOLUTIONS
One Biscayne Tower, Suite 2250
2 South Biscayne Boulevard
Miami, Florida 33131
305-376-8800

December 31, 2018
Director Juan Perez
c/o Altanese Phenelus, ESQ.
Stephen P. Clark Center
111 NW First Street, Suite 2810
Miami, Florida 33128
aphenelus@miami-airport.com

RE: Dan Daley, et al. -vs- Richard Scott, et al.

Dear Ms. Phenelus:

With reference to the deposition of Director Juan Perez taken on December 11th, 2018 in connection with the above-captioned case, please be advised that the transcript of the deposition has been completed and is awaiting signature.

Please have your client read the transcript and complete the errata page. Upon completion, please send the signed errata to our office at Two South Biscayne Blvd., Ste. 2250, Miami, FL, 33131, or email it to litsup-fla@veritext.com.

If this is not taken care of, however, within the next 30 days, we shall conclude that the reading and signing of the deposition has been waived and the original, which has already been forwarded to the ordering attorney, may be filed with the Clerk of the Court without further notice.

Sincerely,

Production Department
Veritext Florida

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA
CASE NO. 2018-CA-000882

BROWARD COUNTY, et al.,

Plaintiff,

vs.

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

Defendant.
_____/

Weiss Serota Helfman Cole & Bierman
200 East Broward Boulevard, Ste 1900
Ft. Lauderdale, Florida 33301
Wednesday, December 12, 2018
10:05 A.M.

DEPOSITION OF
LEIGH ANN HENDERSON

Taken before IRIS GONZALEZ, Court Reporter and Notary Public in and for Miami-Dade County, State of Florida at Large.

EXHIBIT
C

APPEARANCES:

TIMOTHY L. NEWHALL, ESQ.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
On behalf of Defendants, State of Florida, Bondi, Putnam, Swearingen, Norman and Patronis

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111 NW First Street, Suite 2810
Miami, Florida 33128
On behalf of Miami-Dade County

ANGELA F. BENJAMIN, ESQ.
Stephen P. Clark Center
111 NW First Street, Suite 2810
Miami, Florida 33128
On behalf of Miami-Dade County

KERRY L. EZROL, ESQ.
Goren Cheroff Doody & Ezrol, P.A.
3099 E. Commercial Blvd., Suite 200
Fort Lauderdale, Florida 33308
On behalf of Plaintiff, Daley

DAVID L. BAYER, ESQ.
Proskauer Rose LLP
Eleven Times Square
New York, New York 10036
On behalf of Plaintiff Daley

ADAM M. HAPNER, ESQ.
Weiss Serota Helfman Cole & Bierman
200 East Broward Boulevard, Ste 1900
Ft. Lauderdale, Florida 33301
On behalf of Plaintiff, Western

I N D E X

EXHIBITS

BY MR. NEWHALL:

Q. Ma'am, do you know if the City of Wilton Manors has been threatened with any enforcement action under Section 790.33, subpart 3, Florida Statutes because of any regulations that some individual or entity may claim violated that statute?

A. In talking with our elected officials and the research that I've done, not determined that's been a direct threat, but several of our Commissioners indicated that the penalties within the statute constituted in their minds a threat from living forward with adopting any regulations.

Q. Have any of these Commissioners ever informed you that they have received I don't know either over the telephone, in person, by email in any way any threat that you know to be the subject of some enforcement action via a lawsuit or whatever for violating the penalty provisions of Section 790.33?

MR. BAYER: Objection as to form.

THE WITNESS: They did not indicate that they received a direct threat, but they did say, one of our current Commissioners, currently the Mayor, indicated that he's been

receiving unsolicited communications from the NRA general communication and he perceived that to be an indication that they were aware of him as an elected official.

BY MR. NEWHALL:

Q. Did the Mayor indicate, you know, what the nature of these communications were?

A. General communications. Probably a list of served mailings for which he did not sign up.

Q. Is the Mayor a member of the NRA?

MR. BAYER: Objection, not a section of the topics.

BY MR. NEWHALL:

Q. Maybe that's why he gets emails. I don't know.

A. I don't believe he is.

Q. Has the City of Wilton Manors been named in any lawsuits by any private organizations or individuals for allegedly violating 790.33?

A. No.

Q. To your knowledge has the City of Wilton Manors or any of it Commissioners or employees ever been threatened with any type of enforcement action under 790.33 by any representative or agency of the State of Florida?

MR. BAYER: Objection as to form.

THE WITNESS: I'm not aware of any.

BY MR. NEWHALL:

Q. Has the City of Milton Manors to your knowledge through any of its officials had any communication with the Attorney General's Office or any other state agency about 790.33?

A. Not with the Attorney General's Office, but with elected representatives at the state level they have, yes.

Q. In other words, would that kind of fall within lobbying your elected representatives about, you know, perhaps they were -- about this law, for example?

A. I don't know that I would say the state representatives were lobbying our elected officials.

Q. No, visa versa.

A. Oh, yes.

Q. Bear with me for just a minute.

A. Okay.

Q. Again, I'm going to have to back up just because my note taking is bad and my memory is not good as it might be in an hour or two.

Did you say that there were any actual resolutions other than the one that we

discussed that had been passed by the City Commission?

MR. BAYER: Objection as to form.

THE WITNESS: The City Commission has passed other resolutions.

BY MR. NEWHALL:

Q. Concerning the regulation of firearms or what they would like to do concerning the regulation of firearms?

A. Yes, what they would like to do and supporting state action, federal action.

Q. Would these be resolutions encouraging I don't know the State of Florida Legislature to adopt certain positions or to change positions regarding the regulation of firearms?

A. Yes, that has been included in the resolutions.

Q. Any resolution has also been forwarded to the federal government?

A. Yes.

Q. To your knowledge has the City Commission you mentioned I think perhaps an assault weapon's ban would be one thing. Would any mention in any of these resolutions that you're aware of either the size or the magazines that are incorporated into

CERTIFICATE OF OATH

THE STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

I, the undersigned authority, certify that LEIGH ANN HENDERSON personally appeared before me and was duly sworn.

WITNESS my hand and official seal this 12th day of December, 2018.

IRIS GONZALEZ, REPORTER
Notary Public - State of Florida
Commission # GG 244952
Expires: 8-23-2022

TRANSCRIPT CERTIFICATE

STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

I, IRIS GONZALEZ, Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 29th day of December, 2018.

IRIS GONZALEZ, REPORTER
Notary Public

VERITEXT LEGAL SOLUTIONS
One Biscayne Tower, Suite 2250
2 South Biscayne Boulevard
Miami, Florida 33131
305-376-8800

January 2, 2019
Leigh Ann Henderson
c/o David L. Bayer, Esq.
Proskauer Rose LLP
Eleven Times Square
New York, New York 10036
dbayer@proskauer.com

RE: Dan Daley, et al. -vs- Richard Scott, et al.

Dear Mr. Bayer:

With reference to the deposition of Leigh Ann Henderson taken on December 12th, 2018 in connection with the above-captioned case, please be advised that the transcript of the deposition has been completed and is awaiting signature.

Please have your client read the transcript and complete the errata page. Upon completion, please send the signed errata to our office at Two South Biscayne Blvd., Ste. 2250, Miami, FL, 33131, or email it to litsup-fla@veritext.com.

If this is not taken care of, however, within the next 30 days, we shall conclude that the reading and signing of the deposition has been waived and the original, which has already been forwarded to the ordering attorney, may be filed with the Clerk of the Court without further notice.

Sincerely,

Production Department
Veritext Florida

EXHIBIT C

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA
CASE NO. 2018-CA-000882

BROWARD COUNTY, ET AL.,

Plaintiff,

vs.

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

Defendant.

_____/

Weiss Serota Helfman Cole & Bierman
200 East Broward Boulevard, Ste 1900
Ft. Lauderdale, Florida 33301
Tuesday, December 11, 2018
3:00 P.M.

DEPOSITION OF
CHARLES DODGE

Taken before IRIS GONZALEZ, Court Reporter and Notary Public in and for Miami-Dade County, State of Florida at Large.

EXHIBIT
D

APPEARANCES:

TIMOTHY L. NEWHALL, ESQ.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
On behalf of Defendants, State of Florida, Bondi, Putnam, Swearingen, Norman and Patronis

ALTANESE PHENELUS, ESQ.
Stephen P. Clark Center
111 NW First Street, Suite 2810
Miami, Florida 33128
On behalf of Miami-Dade County

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Stephen P. Clark Center
111 NW First Street, Suite 2810
Miami, Florida 33128
On behalf of Miami-Dade County

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Everytown
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New York, New York 10017
On behalf of Plaintiff, Daley

DAVID L. BAYER, ESQ.
Proskauer Rose LLP
Eleven Times Square
New York, New York 10036
On behalf of Plaintiff Daley

ADAM M. HAPNER, ESQ.
Weiss Serota Helfman Cole & Bierman
200 East Broward Boulevard, Ste 1900
Ft. Lauderdale, Florida 33301
On behalf of Plaintiff, Western

JAMIE A. COLE, ESQ.
Weiss Serota Helfman Cole & Bierman
200 East Broward Boulevard, Ste 1900
Ft. Lauderdale, Florida 33301
On behalf of Plaintiff, Western

I N D E X

EXHIBITS

A. No.
Q. Okay.
A. I didn't mean to cut you short, but no.
Q. You have not been privy to any conversations either telephonically or in person with representatives of the Attorney General's Office?
A. No, I have not.
Q. Any other state agency?
A. No, I have not.
Q. Do you know which representatives of the city may have had conversations with representatives of the Attorney General's Office?
MR. BAYER: Objection as to form.
THE WITNESS: I don't recall any that were related to me.
BY MR. NEWHALL:
Q. Can you identify any representatives of the either the Attorney General's Office or perhaps any other state agencies who were having these conversations with representatives of Parkland?
MR. BAYER: Objection as to form.
THE WITNESS: Could you repeat the question?

BY MR. NEWHALL:

Q. Yes, sir. Can you identify any representatives of either the Attorney General's Office or any other state agency who may have been involved in phone conversations with representatives of the City of Parkland concerning --

A. You mean, Pembroke Pines?

Q. I'm sorry. In Pembroke Pines, excuse me, concerning the enforcement of provisions of 790.33?

MR. BAYER: Objection as to form.

THE WITNESS: No.

BY MR. NEWHALL:

Q. Do you know one way or the other if any representative of the Attorney General's Office had actually indicated that the state would enforce the penalty provisions of 790.33?

MR. BAYER: Objection as to form.

THE WITNESS: I recall it was referenced in a legal memorandum from our City Attorney's Office and there may have been a document from the Attorney General's Office stating the same.

BY MR. NEWHALL:

Q. Do you recall seeing any such memorandum from the Attorney General's Office?

A. I believe I recall one, but not

specifically.

Q. I realize you told me you don't specifically remember it, but do you remember anything about it perhaps author, date, anything of that. And I'm referring specifically to anything from the Attorney General's Office or any other state agency if you can recall indicating a position from the state or enforcement of the statute?

MR. BAYER: Objection as to form.

THE WITNESS: I believe I only recall the stationery that had the Attorney General's name on it.

BY MR. NEWHALL:

Q. Is this something that would have been addressed to the City Attorney's Office or somebody with -- a council member perhaps, the Commission member, I'm sorry?

A. I only recall that there was a document. I don't know who it was addressed to and I don't know who from the office of the state signed it.

Q. I'm going to refer you to paragraph 9 of the Amended Complaint that has been filed on behalf of the City of Pembroke Pines in this case. I've only got one copy of it so I'm just going to hand it to you. I'll allow you to take a look at it. I

don't mean to look over your shoulder. I think it's going to be on the other page, paragraph 9. Take a look at that briefly if you would, sir.

A. Yes.

Q. My question is simply you told me that since July 1st, 2011 there has not been any ordinances passed by the City of Pembroke Pines concerning firearms regulations. What ordinances, if any, would the City of Pembroke Pines consider enacting, but for concerns about the penalty provisions that are contained within Florida Statute 790.33?

A. I believe Section 9 refers to one of the primary concerns are, in fact, the large capacity magazines and the ability that posts a serious danger not only to schools, but anyplace where is large congregation of people. And that's something that cities would like to do, but they're very concerned because of the penalties that have been identified in the statute. Not only with the removal from office, but attorney's fees. And it's not only from the state, but it could be from any organization or individual person so they're very cautious and have been advised so by the City Attorney.

CERTIFICATE OF OATH

THE STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

I, the undersigned authority, certify that CHARLES DODGE personally appeared before me and was duly sworn.

WITNESS my hand and official seal this 11th day of December, 2018.

IRIS GONZALEZ, REPORTER
Notary Public - State of Florida
Commission # GG 244952
Expires: 8-23-2022

TRANSCRIPT CERTIFICATE

STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

I, IRIS GONZALEZ, Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 28th day of December, 2018.

IRIS GONZALEZ, REPORTER
Notary Public

VERITEXT LEGAL SOLUTIONS
One Biscayne Tower, Suite 2250
2 South Biscayne Boulevard
Miami, Florida 33131
305-376-8800

December 31, 2018
Charles Dodge
c/o David L. Bayer, Esq.
Proskauer Rose LLP
Eleven Times Square
New York, New York 10036
dbayer@proskauer.com

RE: Dan Daley, et al. -vs- Richard Scott, et al.

Dear Mr. Bayer:

With reference to the deposition of Charles Dodge taken on December 11th, 2018 in connection with the above-captioned case, please be advised that the transcript of the deposition has been completed and is awaiting signature.

Please have your client read the transcript and complete the errata page. Upon completion, please send the signed errata to our office at Two South Biscayne Blvd., Ste. 2250, Miami, FL, 33131, or email it to litsup-fla@veritext.com.

If this is not taken care of, however, within the next 30 days, we shall conclude that the reading and signing of the deposition has been waived and the original, which has already been forwarded to the ordering attorney, may be filed with the Clerk of the Court without further notice.

Sincerely,

Production Department
Veritext Florida

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA
CASE NO. 2018-CA-000882

BROWARD COUNTY, ET AL.,

Plaintiff,

vs.

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

Defendant.
_____/

Weiss Serota Helfman Cole & Bierman
200 East Broward Boulevard, Ste 1900
Ft. Lauderdale, Florida 33301
Wednesday, December 12, 2018
1:00 P.M.

DEPOSITION OF
MIRIAM RAMOS

Taken before IRIS GONZALEZ, Court Reporter and Notary Public in and for Miami-Dade County, State of Florida at Large.

EXHIBIT
E

APPEARANCES:

TIMOTHY L. NEWHALL, ESQ.
Office of the Attorney General
PL-01, The Capitol
Tallahassee, Florida 32399
On behalf of Defendants, State of Florida, Bondi, Putnam, Swearingen, Norman and Patronis

ABBY CORBETT, ESQ.
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
150 West Flagler Street
Miami, Florida 33130
On behalf of City of Coral Gables

ADAM M. HAPNER, ESQ.
Weiss Serota Helfman Cole & Bierman
200 East Broward Boulevard, Ste 1900
Ft. Lauderdale, Florida 33301
On behalf of Plaintiff, Western

I N D E X

EXHIBITS

Q. How many of those emails containing threat to litigation or enforcement actions did you receive by email?

A. A number, but I couldn't tell you how many.

Q. I presume that all the emails that you received as City Attorney and that all the Commissioners may receive are maintained as part of the public records?

A. They are.

Q. The City of Coral Gables to your knowledge does it comply with public records law set forth in Chapter 119?

A. Absolutely.

Q. What was the vote on law ordinance at the March meeting, number 4?

A. I don't recall.

Q. No more than two, four anyway?

A. Correct.

Q. As a result of that amendment that was considered at the March, one of the March City Commission meetings, were there any enforcement actions threatened against the city or any of the individual Commissioners or city employees for that matter by any representatives or agencies of the

State of Florida?

A. To the City of Coral Gables, the Commissioners as well as myself, the existence of the statute itself was a threat.

Q. Beyond the mere existence of the statute, were there any communications from anyone that might be considered an officer or agent of the State of Florida threatening some sort of enforcement action against the City of Coral Gables as a result of that amendment concerning assault weapons?

MS. CORBETT: Object to the form.

THE WITNESS: No.

BY MR. NEWHALL:

Q. Have there been any resolutions adopted by the Coral Gables City Commission to your knowledge since July of 2011 concerning the regulation of firearms?

MS. CORBETT: Object to the form.

THE WITNESS: There's been a number of resolutions that the Commission adopted regarding that topic.

BY MR. NEWHALL:

Q. Can you tell me in general what those resolutions proposed?

A. There were two resolutions in March of

2018. One requesting or directing my office to research a potential zoning code change to address firearms and the other to join this lawsuit. In addition to that, there were a number of resolutions over the years in the form of urging the Legislature to take action with regards to firearms generally. Also supporting initiatives by the Association of Chief of Police regarding firearms and related topics.

Q. Any resolutions asking the Florida Legislature to perhaps change firearms' laws?

A. Generally, urging them to make them stricter.

Q. Any such resolutions that would have been addressed to the federal government?

A. It's possible, but I can't say for certain.

Q. The zoning code change resolution that you mentioned, do you know if the city has -- if its zoning code says that, you know, gun shops or retail establishments selling firearms need to be in a certain zoning designation?

A. Currently, it does not.

Q. Is it your understanding as City Attorney that current law allows a municipality to have that

CERTIFICATE OF OATH

THE STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

I, the undersigned authority, certify that MIRIAM RAMOS personally appeared before me and was duly sworn.

WITNESS my hand and official seal this 12th day of December, 2018.

_____

IRIS GONZALEZ, REPORTER
Notary Public - State of Florida
Commission # GG 244952
Expires: 8-23-2022

TRANSCRIPT CERTIFICATE

STATE OF FLORIDA)
COUNTY OF MIAMI-DADE)

I, IRIS GONZALEZ, Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

DATED this 29th day of December, 2018.

IRIS GONZALEZ, REPORTER
Notary Public

VERITEXT LEGAL SOLUTIONS
One Biscayne Tower, Suite 2250
2 South Biscayne Boulevard
Miami, Florida 33131
305-376-8800

January 2, 2019
Miriam Ramos
c/o Abby Corbett, Esq.
Stearns Weaver Miller Weissler Alhadeff
& Sitterson, P.A.
150 West Flagler Street
Miami, Florida 33130
acorbett@stearnsweaver.com

RE: Dan Daley, et al. -vs- Richard Scott, et al.

Dear Ms. Corbett:

With reference to the deposition of Miriam Ramos taken on December 12th, 2018 in connection with the above-captioned case, please be advised that the transcript of the deposition has been completed and is awaiting signature.

Please have your client read the transcript and complete the errata page. Upon completion, please send the signed errata to our office at Two South Biscayne Blvd., Ste. 2250, Miami, FL, 33131, or email it to litsup-fla@veritext.com.

If this is not taken care of, however, within the next 30 days, we shall conclude that the reading and signing of the deposition has been waived and the original, which has already been forwarded to the ordering attorney, may be filed with the Clerk of the Court without further notice.

Sincerely,

Production Department
Veritext Florida

From: Stephanie Daniel
To: "Dgoldenstcloud@aol.com"
Subject: City of Orlando & Violation of Section 790.33
Date: Monday, June 11, 2018 11:22:00 AM

Your complaint about whether the City of Orlando is violating section 790.33 has been referred to me for a response. Please be advised that the Office of the Attorney General (OAG) does not have enforcement authority over the issue you raise in your email. And the OAG is not authorized by law to provide opinions about the law to private citizens. See section 16.01, Florida Statutes. To the extent that you believe that the City of Orlando is violating section 790.33 (by attempting to regulate firearms), the OAG has no enforcement authority over that issue. However, section 790.33 does authorize lawsuits by private citizens, such as yourself, to enforce the provisions preempting to the Legislature all regulation of firearms. See section 790.33(3), Florida Statutes. You may wish to contact a private attorney about this. The OAG's authority relating to firearms is limited to a single statute, section 790.251, Florida Statutes, which is the "Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008." I regret that we cannot assist you further.

Stephanie A. Daniel
Chief, State Programs Litigation
Direct line: 850-414-3666
Staff Assistant: Susan Crosby, 850-414-3675
Stephanie.Daniel@myfloridalegal.com

EXHIBIT F

Stephanie Daniel

From: Stephanie Daniel
Sent: Wednesday, June 6, 2018 9:47 AM
To: 'kenbates@juno.com'
Subject: Your Complaint Regarding Gun Sales Restrictions

Dear Mr. Bates,

Your complaint about a recent Orange County Ordinance which requires private party sales to go through a dealer and include a background check and 3 day waiting period was referred to me for a response. First of all, I want to apologize as this response to your first email should have been sent to you first. I inadvertently sent the response to your second email first. I hope this did not create any confusion. Also, I apologize for the delay in responding to your email. It was forwarded to me only this week for a response.

Please be advised that the Office of the Attorney General (OAG) does not have enforcement authority over your issues. And the OAG is not authorized by law to provide opinions about the law to private citizens. See section 16.01, Florida Statutes. To the extent that you believe that section 790.0655 conflicts with the Orange County ordinance, the OAG has no enforcement authority over the provisions of section 790.0655, Florida Statutes. And, the OAG has no enforcement authority over the statute which preempts regulation of firearms, section 790.33, Florida Statutes. However, section 790.33 does authorize lawsuits by private citizens, such as yourself, to enforce the provisions preempting to the Legislature all regulation of firearms. See section 790.33(3), Florida Statutes. You may wish to contact a private attorney about these issues.

The OAG's authority relating to firearms is limited to a single statute, section 790.251, Florida Statutes, which is the "Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008."

I regret that we cannot assist you further.

Stephanie A. Daniel
Chief, State Programs Litigation
Direct line: 850-414-3666
Staff Assistant: Susan Crosby, 850-414-3675
Stephanie.Daniel@myfloridalegal.com

EXHIBIT G

From: Stephanie Daniel
To: "Mark.golomb@yahoo.com"
Subject: Your complaint regarding Orange County Mayor Teresa Jacobs
Date: Monday, June 4, 2018 10:03:00 AM
Attachments: 2014_WL_3797314.pdf

Dear Mr. Golumb,

Your complaint regarding the Orange County Commission and its Mayor Teresa Jacobs has been forwarded to me for a response. You allege violations of section 790.33, Florida Statutes. The Office of the Attorney General (OAG) has not been authorized by the Legislature to enforce the provisions of section 790.33, Florida Statutes. Also, the OAG is not been authorized by law to provide opinions to private citizens. See section 16.01, Florida Statutes. The Attorney General, and the agency she heads, the OAG, have the authority granted by the Florida Constitution and statutes.

You may wish to consult with a private attorney about these issues. Section 790.33(3) does appear to permit an action by a private person to enforce its provisions. Regarding your query about initiating a removal action from office, please see the attached order, which found the provisions of section 790.33(3)(e) to be unconstitutional to the extent that they purport to allow the Governor to remove someone from office for violating section 790.33. I regret that we cannot help you further.

Stephanie A. Daniel
Chief, State Programs Litigation
Direct line: 850-414-3666
Staff Assistant: Susan Crosby, 850-414-3675
Stephanie.Daniel@myfloridalegal.com

EXHIBIT H

From: Stephanie Daniel
To: "peter@theironeasel.com"
Subject: Your Complaint Regarding the City of Orlando"s Policy on Firearms
Date: Tuesday, January 30, 2018 10:44:00 AM

Dear Mr. Upfield,

I know that I sent you an email with follow up questions regarding your complaint regarding the City of Orlando's policy on firearms, but I wanted to follow up with you and let you know that the Office of the Attorney General lacks jurisdiction over your complaint. Generally, municipalities are preempted from regulating firearms, pursuant to section 790.33, Florida Statutes. The regulation of firearms is exclusively the function of the Florida Legislature, with some exceptions stated in section 790.33(4), Florida Statutes. In looking at section 790.33, it does not appear that the Florida Legislature has authorized the Office of the Attorney General to enforce its requirements. However, it appears that affected individuals may bring suit themselves to enforce the statute. You may want to contact a private attorney about this matter. I regret that we cannot help you further.

Stephanie A. Daniel
Chief, State Programs Litigation
Direct line: 850-414-3666
Staff Assistant: Susan Crosby, 850-414-3675
Stephanie.Daniel@myfloridalegal.com

EXHIBIT
I

From: Stephanie Daniel
To: ray.thornton@navy.mil
Subject: Your complaint regarding the Saenger Theater & Bay County
Date: 11/01/2017 11:56 AM

Dear Mr. Thornton:

Thank you for bringing your concerns about the ability of customers to have firearms in the Saenger Theater in Bay County to the attention of the Office of the Attorney General. Unfortunately, the Office of the Attorney General does not have jurisdiction over your complaint. However, section 790.33(3)((f), Florida Statutes, permits individuals who are affected by what they believe to be improper regulations of firearms to bring suit over the matter themselves. If you wish to pursue this option, you may want to consult with a private attorney. I regret that we cannot help you further.

Sincerely,

Stephanie A. Daniel
Chief, State Programs Branch
Staff Assistant: Susan Crosby, 850-414-3675
Stephanie.Daniel@myfloridalegal.com

EXHIBIT
J