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

CITY OF WESTON, FLORIDA, et al.,

Plaintiffs,

v.

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

Defendants.

_____ /

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

Judge Charles W. Dodson

Oral Argument Requested

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

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

PLAINTIFFS' CONSOLIDATED MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

In these three consolidated actions, Plaintiffs, which include thirty municipalities, three counties, more than seventy elected local officials, and one individual citizen, file this Motion for Summary Judgment requesting the Court declare unconstitutional the harsh penalties set forth in Section 790.33, et seq., Florida Statutes.

Table of Contents

I. Standard of Review 7

II. The Penalty Provisions Violate Absolute Legislative Immunity Afforded to Local Legislators. 8

A. Municipal Legislators in Florida are Absolutely Immune from Suits Arising from Their Legislative Acts. 9

B. By Penalizing Elected Officials for Casting Votes on Legislation, the Penalty Provisions Violate the Principle of Absolute Legislative Immunity. 11

III. Section 790.33(3)(f) Violates Governmental Function Immunity for Local Governments. 13

IV. The Gubernatorial Removal Provision of the Preemption Penalties is Unconstitutional. 18

A. The Legislature Cannot Expand the Governor's Constitutional Authority to Remove County Officers. 18

B. The Legislature Cannot Expand the Governor's Constitutional Authority to Remove Municipal Officers. 19

V. The Penalty Provisions Violate Plaintiffs' Speech, Association, and Petition Rights under the United States and Florida Constitutions. 21

A. The Penalty Provisions are Impermissible Content-Based Restrictions that Impair Core Political Speech. 23

B. The Penalty Provisions Impair Associational Rights. 29

C. The Penalty Provisions Impede the Rights to Petition and Instruct. 30

D. The Penalty Provisions are Overly Broad. 32

VI. The Preemption Law is Void For Vagueness. 33

A. The Preemption Law is Vague as to What It Prohibits 35

B. The Preemption Law is Vague as to Whom It Applies. 38

VII. The Penalty Provisions Have the Effect of Rewriting Antecedent Contracts in Violation of Article I, Section 10, of the Florida Constitution. 41

VIII. The Plaintiffs are Entitled to Declaratory Judgment that Certain Proposed Regulations are Permissible. 44

IX. Defendants' Affirmative Defenses are Legally Insufficient. 50

Conclusion 57

INTRODUCTION

Plaintiffs ask the Court to declare that the harsh penalties (the "Penalty Provisions") for violations of the statutory preemption against local regulation of firearms and ammunition set forth in Section 790.33, et seq., Florida Statutes (the "Preemption Law"), are unconstitutional under the Florida and United States Constitutions. The Penalty Provisions are purportedly intended to "deter and prevent" violations of the Preemption Law, but the Penalty Provisions are so harsh and the Preemption Law so vague that they preclude local governments and elected officials from taking any action that is even remotely related to firearms or that might conceivably or arguably be interpreted or misconstrued as preempted.

The Penalty Provisions threaten a panoply of harsh penalties against local governments and elected officials:

- ***Fines up to $5,000*** against elected officials for knowingly and willfully violating the statute (§ 790.33(3)(c), Fla. Stat.);
- ***Removal from office*** for any person knowingly and willfully violating the statute while acting in an official capacity (§ 790.33(3)(e), Fla. Stat.);
- ***Damages of up to $100,000 (plus uncapped attorneys' fees)*** against the local government entity to any "adversely affected" individual or entity (§ 790.33(3)(f), Fla. Stat.);
- ***Prohibition on the use of public funds to defend*** or reimburse an official found to have knowingly and willfully violated the Preemption Law (§ 790.33(3)(d), Fla. Stat.); and
- ***Fines up to $5 million*** against a local government if a list, record, or registry of firearms or firearm owners was compiled or maintained with the knowledge or complicity of the local government entity (§ 790.335(4)(c), Fla. Stat).

The Penalty Provisions are unconstitutional on multiple grounds. As set forth in Sections II and III below, the Penalty Provisions violate separation of powers: the imposition of harsh penalties upon local legislators violates absolute legislative immunity of local legislators, and penalizing local governments for their discretionary legislative acts violates governmental

function immunity. These two well-established doctrines – both founded upon the bedrock principle of separation of powers – preclude laws such as the Penalty Provisions that purport to punish legislators and local governments for enacting legislation.

The unconstitutionality of the Penalty Provisions' gubernatorial removal provision is not a matter of first impression: the Leon County Circuit Court has previously found the Penalty Provisions' gubernatorial removal provision to be unconstitutional as applied to county commissioners. This motion, in Section IV, asks this Court to go one step further and confirm the facial unconstitutionality of this provision as to all county and municipal officers.

Section V shows that the Penalty Provisions also violate the rights of speech, association, petition, and instruction protected by the United States and Florida Constitutions. By effectively posting a bounty for ideological lawsuits, the Penalty Provisions intimidate and ultimately prevent local legislators from passing, considering, or even proposing constituent-supported regulations that they genuinely believe are not preempted and discourage constituents from lobbying their elected officials. When judged against the high standard for content-based restrictions on core political speech and the fundamental freedoms of association, petition, and right to instruction, the Penalty Provisions fall far short.

As discussed in Section VI, the Preemption Law also violates fundamental notions of due process because it provides no definite warning as to what conduct it prohibits or to whom it applies, leaving local legislators at a loss to know what conduct is precluded or how the Preemption Law might be enforced, whether by state authorities or citizens "adversely affected" by local government action. Forcing local governments and local officials to guess at what may or may not be preempted – while facing the specter of the Penalty Provisions – violates fundamental notions of due process.

The Penalty Provisions also impair the contractual rights and remedies of Broward and Leon Counties with their respective County Administrators as explained in Section VII.

Especially after the horrific tragedies at Marjory Stoneman Douglas High School in Parkland, Florida, and the Pulse Nightclub in Orlando, Florida, Plaintiffs have been urged to take action by their constituents and desire to enact certain legislation that they believe is not preempted. *See* Plaintiffs' Statement of Facts in Support of Plaintiffs' Consolidated Motion for Summary Judgment ("SOF") (filed simultaneously herewith), ¶¶ 5, 10-12. For example, as reflected in the supporting affidavits and resolutions, specific regulatory, legislative, policy, and proprietary actions (the "Proposed Actions") that the Plaintiffs seek to implement include ordinances, regulations, policies, and business decisions that would:

- Require procedures or documentation to ensure compliance with mandatory waiting periods and criminal history background checks;
- Require the reporting of failed background checks;
- Prohibit the sale or transfer of certain after-market, large-capacity detachable magazines;
- Restrict the possession, display, or sale of firearms in government-owned or government-operated facilities and locations;
- Require notices at government-owned or government-operated facilities either prohibiting firearms or encouraging patrons not to carry firearms while on site; and
- Preclude firearms on a year-round basis in certain areas specified as statutory exceptions to permissible concealed weapons, including polling places or school administration buildings.

See SOF, ¶ 12.

However, Plaintiffs have refrained from enacting these Proposed Actions (among other actions) because of the severe chilling effect imposed by the Preemption Law's vagueness coupled with the severity of the Penalty Provisions. This potent combination thwarts *any* efforts local

governments would otherwise take, lest they expose themselves and their elected officials to fines, damages, and potentially loss of office.

Plaintiffs' fears are credible and substantiated by the enforcement actions and other litigation brought to date against several Plaintiffs and other local governments, as well as the Attorney General's public position on the Preemption Law (as demonstrated by advisory opinions and intervention in prior lawsuits to defend the Penalty Provisions). SOF, ¶¶ 7-8. Plaintiffs have also received numerous threats received from private individuals and entities contending that action taken or contemplated by Plaintiffs violates the Preemption Law and threatening suit under the Penalty Provisions. SOF, ¶ 6. As a result, local elected officials justifiably believe that taking any action with any connection to firearms or ammunition, however remote, poses a substantial risk that they will subject themselves and their local governments and officials to litigation, fines, removal from office, and significant monetary liability. SOF, ¶¶ 10-12.

This Court previously disposed of Defendants' affirmative defenses when this Court determined that: (1) Plaintiffs have standing; (2) the claims asserted are justiciable; and (3) the current Defendants are properly named. Given that Plaintiffs' causes of action are based upon the plain language of the statutes, there are no material facts in dispute. Defendants have served extensive written discovery on more than seventy Plaintiffs, and Plaintiffs have collectively responded to hundreds of interrogatories, produced tens of thousands of documents, and produced corporate representatives for deposition. Defendants have had ample opportunity to take discovery, and there are no material disputed facts. Plaintiffs' claims are premised upon the text of the statutes. Therefore, as a matter of law, Plaintiffs are entitled to a declaration that the Penalty Provisions are unconstitutional.

If, notwithstanding the arguments presented in this motion, the Court finds any of the challenged Penalty Provisions *constitutional*, then Plaintiffs ask the Court to declare the legal permissibility of specific actions and regulations that certain Plaintiffs desire to take, as set forth in Section IX. If, however, the Court finds *all* of the Penalty Provisions *un*constitutional, then the Court need not proceed to consider Section IX, as the Damoclean penalties would no longer hang over Plaintiffs, precluding them from enacting legislation reasonably believed to be not preempted.

I. STANDARD OF REVIEW

The summary judgment standard under Rule 1.510 of the Florida Rules of Civil Procedure is well established: "Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law." *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

Because this Court has previously denied Defendants' motion to dismiss, Plaintiffs are entitled a declaration of their rights. *See Sears, Roebuck & Co. v. Forbes/Cohen Fla. Props., L.P.*, 223 So. 3d 292, 298 (Fla. 4th DCA 2017) ("Under [the Declaratory Judgment Act], where a trial court denies a motion to dismiss, the trial court must 'fully determine the rights of the respective parties, as reflected by the pleadings.'") (quoting *Local 532 of the Am. Fed'n of State, Cty. & Mun. Emps., AFL-CIO v. City of Fort Lauderdale*, 273 So. 2d 441, 445 (Fla. 4th DCA 1973)); *Hyman v. Ocean Optique Distribs., Inc.*, 734 So. 2d 546, 548 (Fla. 3d DCA 1999) ("[H]aving determined that [plaintiff] was entitled to a declaration of his rights . . . , the lower court was then obligated, under established Florida law, to enter a judgment explicitly outlining the parties' respective rights or obligations.").

II. THE PENALTY PROVISIONS VIOLATE ABSOLUTE LEGISLATIVE IMMUNITY AFFORDED TO LOCAL LEGISLATORS.[1]

By subjecting local officials to the Penalty Provisions solely for enacting local legislation that is later found to violate the Preemption Law, the Penalty Provisions violate the long-standing principle of absolute legislative immunity. Indeed, government officials have been entitled to absolute immunity from liability for their legislative activities in both state and federal courts since the nation was founded. *See, e.g.*, *Tenney v. Brandhove*, 341 U.S. 367, 372-75 (1951) (tracing the origins of absolute legislative immunity back to the founding of our nation and beyond, and noting that absolute legislative immunity was "taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation").

In addition to being a fundamental principle of the democratic system, the doctrine makes sense. When a legislator's decisions are chilled by the threat of litigation and personal liability, the official cannot be faithful to the interests of the citizens and jurisdiction he or she represents. *See Forrester v. White*, 484 U.S. 219, 223 (1988) (stating that legislators faced with personal liability "may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct"). Absolute immunity allows legislators to focus on the work they were elected to perform, rather than having their "time, energy, and attention" diverted away from their legislative tasks by litigation that may have been brought solely to delay and disrupt those tasks. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). Absolute immunity also ensures that qualified citizens are not deterred from accepting public office due to the expense of

[1] This claim, which applies to sections 790.33(3)(a), (c)-(e), is asserted in Count I of the *Daley* Amended Complaint, Case No. 2018-CA-001509 ("*Daley* Compl."), Count II of the *Weston* Amended Complaint, Case No. 2018-CA-000699 ("*Weston* Compl."), and Count III of the *Counties* Amended Complaint, Case No. 2018-CA-000882 ("*Counties* Compl.").

litigation. *See Tucker v. Resha*, 648 So. 2d 1187, 1189-90 (Fla. 1994). Absolute legislative immunity is especially important at the local level, "where the part-time citizen-legislator remains commonplace" and where any threat of liability "may significantly deter service in local government." *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) (internal citation omitted).

By imposing personal liability and other penalties on local elected officials merely for voting on legislation, subsections 790.33(3)(a), (c)-(e) of the Penalty Provisions amount to an unprecedented and unlawful attempt to abrogate this fundamental principle of American democracy.

A. Municipal Legislators in Florida are Absolutely Immune from Suits Arising from Their Legislative Acts.

It is a "well established" principle of American law that federal, state, regional, and local legislators are "entitled to absolute immunity from civil liability for their legislative activities." *Bogan*, 523 U.S. at 46, 52 (further noting that the "rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators"). Thus, the United States Constitution, Florida Constitution, and the common law all guarantee this absolute immunity to legislators. *See, e.g.*, *Tenney*, 341 U.S. at 372-75; *Fla. House of Representatives v. Expedia*, 85 So. 3d 517, 522-24 (Fla. 1st DCA 2012).

When local legislators are engaged in legislative activities, they are entitled to absolute immunity regardless of their motive in undertaking the legislative action, the end result of their legislative action, or any other factor. *See, e.g.*, *Bogan*, 523 U.S. at 54-55 ("[I]t simply is not consonant with our scheme of government for a court to inquire into the motives of legislators.") (internal quotation marks omitted); *Yeldell v. Cooper Green Hospital, Inc.*, 956 F.2d 1056, 1058-59 (11th Cir. 1992) (noting that county commissioners would have had absolute immunity from suit in vote for unconstitutional ordinance); *Chappell v. Robbins*, 73 F.3d 918, 921 (9th Cir. 1996)

(finding that legislator who sponsored bills and pushed for their passage in exchange for bribes was nonetheless engaged in legislative action, which entitled him to immunity).[2]

Like the United States Constitution, the Florida Constitution provides absolute legislative immunity to local officials engaged in legislative activities. Specifically, the separation of powers provision of the Florida Constitution provides Florida legislators with absolute legislative immunity. *See Expedia*, 85 So. 3d at 524 (citing separation of powers as an independent source of legislative immunity, in addition to the common law); *cf. League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 145 (Fla. 2013) (concluding that legislative privilege comes from the separation of powers provision of the Florida Constitution and further noting that legislative privilege is derived from the principle of legislative immunity); *Carter v. City of Stuart*, 468 So. 2d 955, 957 (Fla. 1985) (noting that the "judicial branch should not trespass" into the legislative decision-making process). Because absolute legislative immunity derives from the Florida Constitution's separation of powers provision, the Florida Legislature may not override it by imposing liability on local elected officials for their legislative acts. *See Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 266 (Fla. 1991) (striking down law passed by the Florida Legislature as a violation of the separation of powers provision of the Florida Constitution).

Likewise, the common law provides absolute legislative immunity to Florida legislators. *See Expedia*, 85 So. 3d at 522-23 ("[T]he privileges and immunities protecting all government officials, including those who serve in the legislative branch, arise from the common law . . . ."); § 2.01, Fla. Stat. (adopting the common law). Indeed, Florida courts have uniformly recognized

---

[2] Absolute legislative immunity is "so well grounded in history and reason," *Tenney*, 341 U.S. at 376, that the Supreme Court has even recognized it for non-legislators engaged in legislative functions. *See Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 731-34 (1980).

that legislators at the state and local level are entitled to absolute immunity from suit for acts taken in their legislative capacity. *See, e.g.*, *Prins v. Farley*, 208 So. 3d 1215 (Fla. 1st DCA 2017) (city council member was entitled to absolute immunity for allegedly false and malicious statements made in connection with the dismissal of the city manager where city council had authority to dismiss the manager); *City of Pompano Beach v. Swerdlow Lightspeed Mgmt. Co., LLC*, 942 So. 2d 455, 456 (Fla. 4th DCA 2006) ("[L]ocal officials are immune from civil suits for their acts done within the sphere of legislative activity."); *Junior v. Reed*, 693 So. 2d 586, 589 (Fla. 1st DCA 1997) ("The protection afforded by absolute immunity is available to local governmental officials as well as to those officials performing legislative functions at the federal and state levels."); *P.C.B. P'ship v. City of Largo*, 549 So. 2d 738, 740-41 (Fla. 2d DCA 1989) ("City council members enjoy absolute immunity in civil rights actions when acting in a legislative capacity."); *Penthouse, Inc. v. Saba*, 399 So. 2d 456, 458 (Fla. 2d DCA 1981) ("If an exercise of legislative or judicial power is involved, the immunity is absolute."); *Hough v. Amato*, 260 So. 2d 537, 537 (Fla. 1st DCA 1972) ("It is established law that officials of municipal corporations who are engaged in functions which are legislative, judicial, quasi-legislative or quasi-judicial in character are immune from suit.").

B. By Penalizing Elected Officials for Casting Votes on Legislation, the Penalty Provisions Violate the Principle of Absolute Legislative Immunity.

Casting votes on legislation is a classic legislative function that is entitled to protection under the doctrine of legislative immunity. *See, e.g.*, *Carrigan*, 564 U.S. at 121 (voting is a "core legislative function"); *Bogan*, 523 U.S. at 55 (local official who voted for an ordinance entitled to absolute legislative immunity for that act); *Junior*, 693 So. 2d at 589 ("A county commissioner could assert a valid claim of absolute immunity for the act of voting on a proposed county budget, for example, because that is a legislative function."); *Carter*, 468 So. 2d at 957 ("Deciding which laws are proper and should be enacted is a legislative function."). Whether absolute immunity

applies depends on the function of the act, not the motivation behind the action; thus, absolute legislative immunity protects and insulates Florida legislators from any liability for voting for any legislation, including legislation that is later found to violate the Preemption Law. *See, e.g.*, *Yeldell*, 956 F.2d at 1058-59 (voting for unconstitutional ordinance would still be legislative action protected by absolute legislative immunity).

Tellingly, in the Final Bill Analysis of the 2011 amendment to section 790.33, the House expressly considered whether the penalty provisions violate principles of absolute legislative immunity. SOF, Ex. 19 (Final Bill Analysis, H.B. 45) at 4. However, the House ignored that concern based upon the flawed premise that "lawmaking in the preempted field" is a "ministerial," as opposed to "legislative," act. *Id.* Under Florida law, "[a] duty or act is defined as ministerial when there is no room for the exercise of discretion, and the performance being required is directed by law." *Shea v. Cochran*, 680 So. 2d 628, 629 (Fla. 4th DCA 1996). Yet the process of lawmaking inherently requires a great deal of discretion and is certainly not a ministerial act. Rather, as explained above, casting votes in favor of a given piece of legislation is a classic legislative act entitled to absolute legislative immunity.

The fact that the penalties apply only to "knowing and willful" violations is irrelevant. As explained above, a legislator's motives and state of mind do not impact the immunity analysis. *See supra* Section II.A. If anything, by requiring the court to inquire into the hearts and minds of the legislators, the "knowing and willful" requirement will necessarily lead to violations of legislative privilege as well. *See Expedia*, 85 So. 3d at 521 ("The testimonial privilege . . . is closely related to the immunity that protects a legislator from civil liability."); *City of Gainesville v. Scotty's, Inc.*, 489 So. 2d 1196, 1197 (Fla. 1st DCA 1986) ("[T]he commissioners' 'motives and intent' with respect to the zoning law changes are irrelevant.").

Although absolute legislative immunity protects elected officials who vote on legislation, the Penalty Provisions attempt to impose harsh penalties on local legislators who vote on ordinances and regulations subsequently determined to be preempted. *See* § 790.33(3)(a), (c)-(e), Fla. Stat. (subjecting any official who knowingly and willfully enacts any local ordinance or other rule that conflicts with the Preemption Law to a civil penalty, loss of office, and loss of indemnification for defense costs). The imposition of any such penalties for the simple act of voting for local legislation violates absolute legislative immunity; it seeks to punish legislators for core legislative actions. The Penalty Provisions of section 790.33(3)(a), (c)-(e) must therefore be struck down.

III. SECTION 790.33(3)(F) VIOLATES GOVERNMENTAL FUNCTION IMMUNITY FOR LOCAL GOVERNMENTS.[3]

The Municipal and County Plaintiffs are immune from suit for performing discretionary government functions under the Florida Constitution's separation of powers provision, Article II, Section 3. Section 790.33(3)(f) violates this immunity because it creates a strict liability cause of action for damages (up to $100,000, plus uncapped including attorneys' fees and costs) against local governments that perform the discretionary governmental act of enacting or causing to be enforced any ordinances or administrative rules or regulations relating to firearms that are later found to have violated the Preemption Law. *See Fla. Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, 465 (Fla. 1st DCA 2017) (interpreting the term "promulgated," as used in section 790.33(3)(f), as meaning "the time [the ordinances] were enacted and initially published."). The Municipal and County Plaintiffs face such liability even if their officials act in good faith and in reliance on the advice of their counsel. *See* § 790.33(3)(b), Fla. Stat.

[3] This claim is asserted in Count III of the *Weston* Compl., Counts II and III of the *Daley* Compl., and Count IV of the *Counties* Compl.

As the Florida Supreme Court has held: "Clearly, the legislature, commissions, boards, city councils, and executive officers, by their enactment of, or failure to enact, laws or regulations . . . are acting pursuant to basic governmental functions performed by the legislative or executive branches of government." *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 919 (Fla. 1985). Likewise, local governments have "sovereign immunity from liability for enforcing or failing to enforce [their] laws." *Miami-Dade Cty. v. Jones*, 232 So. 3d 1127, 1130 (Fla. 3d DCA 2017). *Trianon Park*, 468 So. 2d at 919 ("How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there never has been a common law duty of care.").

"Judicial intervention through private tort suits into the realm of discretionary decisions relating to basic governmental functions would require the judicial branch to second guess the political and police power decisions of the other branches of government and would violate the separation of powers doctrine." *Id.* at 918. Accordingly, "[w]here governmental actions are deemed discretionary, as opposed to operational, the government has absolute immunity from suit." *City of Freeport v. Beach Cmty. Bank*, 108 So. 3d 684, 687 (Fla. 1st DCA 2013), *approved in applicable part but quashed on other grounds*, 150 So. 3d 1111, 1115 (Fla. 2014). "The underlying premise for this immunity is that it cannot be tortious conduct for a government to govern." *Dep't of Transp. v. Neilson*, 419 So. 2d 1071, 1075 (Fla. 1982).

Indeed, despite the fact that section 768.28, Florida Statutes, which establishes a limited waiver of sovereign immunity for tort actions, does not include an express exception for discretionary governmental functions, the Florida Supreme Court has nevertheless held that "certain policy-making, planning or judgmental governmental functions *cannot be the subject of*

traditional tort liability." *Commercial Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010, 1020 (Fla. 1979) (emphasis added). In fact, the Legislature *could not* abrogate governmental function immunity because immunity is rooted in the constitutional principles of separation of powers, superseding any state statute to the contrary. *See Trianon*, 468 So. 2d at 918 (explaining that this doctrine is based on the constitutional separation of powers doctrine); *see also Kaisner v. Kolb*, 543 So. 2d 732, 737 (Fla. 1989) (holding that "governmental immunity derives entirely from the doctrine of separation of powers").

Governmental function immunity applies in full force to municipalities and counties. *See Cauley v. City of Jacksonville*, 403 So. 2d 379, 386-87 (Fla. 1981); *see also Beach Cmty. Bank*, 150 So. 3d at 1114 (holding that a municipality is immune from suit for actions taken as part of its "inherent, fundamental policy-making authority"); *Carter*, 468 So. 2d at 956-57 (holding that city's planning-level governmental decisions are immune from suit); *Lewis v. City of St. Petersburg*, 260 F.3d 1260, 1264-66 (11th Cir. 2011) (applying Florida law) ("[A] government agency is immune from tort liability based upon actions that involve its 'discretionary' functions, such as development and planning of governmental goals and policies.").

The decision of a local legislative body to enact or enforce an ordinance, rule, or regulation that may impact firearms is undeniably a discretionary decision. Enacting or enforcing such an ordinance, rule, or regulation involves the determination of governmental policies and objectives, is an essential step in the accomplishment of such policies and objectives, requires the exercise of basic policy evaluation and judgment on the part of the local government, and is within the counties' and municipalities' constitutional and statutory authority.[4] *See Trianon*, 468 So. 2d at

[4] For the same reason, to the extent that the Preemption Laws are found to apply to enacting or causing to be enforced any "measure," "directive," "enactment," "order," or "policy," *see infra* Section VI.A., these discretionary actions would be immune from suit as well.

919; *see also Carter*, 468 So. 2d at 957 ("Deciding which laws are proper and should be enacted is a legislative function. . . . The judicial branch should not trespass into [this] decisional process."). Even apart from the "ancient doctrine of immunity," municipalities and counties are not liable in lawsuits for legislative acts as a "simple aspect of sovereignty." *Commercial Carrier Corp.*, 371 So. 2d at 1020 ("[T]here are areas in the act of governing which cannot be subject to suit and scrutiny by judge or jury without violating the separation of powers doctrine."); *Cauley*, 403 So. 2d at 386-87 (citing *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 133 (1957) (municipalities have never been liable for damages based on their legislative or judicial acts)).

Florida courts routinely strike down statutes that violate the separation of powers doctrine. *See, e.g., Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) (noting that the separation of powers is a "cornerstone of democracy" and striking down statute that delegated legislative power to executive); *Pepper v. Pepper*, 66 So. 2d 280, 284 (Fla. 1953) (holding that "[t]he Courts have been diligent in striking down acts of the Legislature" that violate separation of powers).[5] The decision of a local legislative body to enact or enforce an ordinance, rule, or regulation that the local government believes in good faith is within its jurisdiction is undeniably a quintessential discretionary decision. *Commercial Carrier Corp.*, 371 So. 2d at 1016, 1019-20 (noting that "legislative, quasi-legislative, judicial and quasi-judicial acts of municipalities" are among the discretionary governmental decisions historically protected from suit).

---

[5] Florida courts routinely apply separation of powers to protect discretionary actions of local governments. *See Detournay v. City of Coral Gables*, 127 So. 3d 869, 872-74 (Fla. 3d DCA 2013) (holding separation of powers barred the court from issuing a declaratory judgment requiring a city to enforce provisions of its building code); *Lap v. Thibault*, 348 So. 2d 622 (Fla. 4th DCA 1977) (holding separation of powers bars court from issuing an injunction requiring city to recover city property); *City of Miami Beach v. Breitbart*, 280 So. 2d 18 (Fla. 3d DCA 1973) (holding trial court would invade a city's legislative power by directing the city to rezone property for a specific use; such action barred by separation of powers).

Even if a court were to subsequently determine that an ordinance or administrative rule or regulation violates the Preemption Law, the decision to enact the preempted law was still a discretionary function protected by absolute immunity. This is true because whether an act is discretionary and protected by governmental immunity turns on the function of the act and whether it involved policy making and planning – not on the legal validity or constitutionality of the action. *See Wallace v. Dean*, 3 So. 3d 1035, 1053-54 (Fla. 2009) ("[P]olitical questions – as opposed to legal questions – fall within the exclusive domain of the legislative and executive branches under the guidelines established by the Florida Constitution.") (quoting *Johnson v. State*, 660 So. 2d 637, 646 (Fla. 1995)); *Elrod v. City of Daytona Beach*, 180 So. 378, 380 (Fla. 1938) ("If the ordinance is unconstitutional . . . it is none the less a governmental act and the municipality is not liable for injuries resulting from the enforcement of the ordinance, any more than the state would be liable for the passage and enforcement of an unconstitutional statute."). Enacting or causing to be enforced any ordinance or administrative rule or regulation is a discretionary, planning-level function, as well as a "political question," "however unwise, unpopular, mistaken, or negligent a particular decision or act might be." *Commercial Carrier Corp.*, 371 So. 2d at 1019.

The same analysis applies here. Even if a court were to ultimately find that Florida cities or counties enacted or caused to be enforced any ordinance or administrative rule or regulation that is contrary to the Preemption Law, the act of doing so is a discretionary political act, for which cities and counties are protected by governmental function immunity. For all of the reasons discussed herein, section 790.33(3)(f), which penalizes local governments that enact or cause to be enforced an ordinance, rule, or regulation subsequently found to be preempted, should be declared unconstitutional because it violates the Municipal and County Plaintiffs' governmental function immunity.

IV. THE GUBERNATORIAL REMOVAL PROVISION OF THE PREEMPTION PENALTIES IS UNCONSTITUTIONAL.

A. The Legislature Cannot Expand the Governor's Constitutional Authority to Remove County Officers.[6]

In *Marcus v. Scott*, No. 2012-CA-001260, 2014 WL 3797314 (Fla. Cir. Ct. Leon Cty. June 2, 2014), the Leon County Circuit Court held that the Governor's stated authority in section 790.33(3)(e) to remove a public official who enacts or causes to be enforced a preempted gun law or regulation[7] contravenes Article IV, section 7 of the Florida Constitution. That constitutional provision authorizes the Governor only to suspend a county commissioner, who may then be removed by the Senate. Art. IV, § 7, Fla. Const. As the *Marcus* court correctly concluded:

> [Section 790.33, Florida Statutes] may not constitutionally authorize the Governor to remove [county officials] from office in the event that they are found to have committed a knowing and willful violation of the State's preemption of firearms regulation. Article IV, section 7, Florida Constitution, authorizes the Governor only to suspend county commissioners and recommend their removal by the Florida Senate; the Legislature has no power to expand the Governor's suspension power into a removal power.

Although the court in that action was not presented, as it is here, with a facial challenge, the reasoning in that case is equally applicable here, and no set of circumstances exists under which the statute would be valid. Therefore, the Court should declare section 790.33(3)(e) unconstitutional as applied to county officers. *See In re Advisory Op. of Gov. Civil Rights*, 306 So. 2d 520, 523 (Fla. 1975) (holding that a constitutional prescription of the manner in which an action should be taken is a prohibition against a different manner of taking the action); *Bruner v.*

---

[6] This claim is asserted in Count I of the *Counties* Compl.

[7] The removal provision reads as follows: "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.

State Comm'n on Ethics, 384 So. 2d 1339, 1340-41 (Fla. 1st DCA 1980) (holding that the Florida Legislature may not vary from the constitutional allocation of power in the gubernatorial suspension of public officials).[8]

B. The Legislature Cannot Expand the Governor's Constitutional Authority to Remove Municipal Officers.[9]

In addition to limiting the Governor's authority with respect to county commissioners, the Florida Constitution also circumscribes the Governor's authority over municipal officers (such as mayors and members of city commissions and councils) in two separate sections. Article IV, section 1(b), provides in relevant part, "The governor may initiate judicial proceedings in the name of the state against any . . . municipal officer *to enforce compliance with any duty* or *restrain any unauthorized act*." Art. IV, § 1(b), Fla. Const. (emphasis added). This authority expressly reflects that the Governor's authority is equitable in nature, allowing for mandamus or injunctive relief, but nowhere mentioning the power to remove a municipal officer from his or her position.

In addition, Article IV, section 7(c), states, "By order of the governor any elected municipal officer *indicted for crime* may be *suspended* from office until acquitted and the office filled by appointment for the period of suspension, not to extend beyond the term, unless these powers are vested elsewhere by law or the municipal charter." Art. IV, § 7(c), Fla. Const. (emphasis added).

---

[8] Section 790.33(3)(e) also violates procedural due process because it does not provide for any process whatsoever when someone's employment is terminated. It is unconstitutional to deprive someone of their lawful property interest in public employment without due process of law. *See McRae v. Douglas*, 644 So. 2d 1368, 1372 (Fla. 5th DCA 1994); *Ragucci v. City of Plantation*, 407 So. 2d 932, 935-36 (Fla. 4th DCA 1981); *see also Reams v. Scott*, No. 4:18cv154-RH/CAS, 2018 WL 5809967 *4 (N.D. Fla. Nov. 6, 2018) (holding the Governor's suspension of an elected official without giving the official an opportunity to be heard violated due process). Section 790.33(3)(e) unconstitutionally provides for a deprivation of a property interest in public employment without any opportunity for notice or an opportunity to be heard.

[9] This claim is asserted in Count VIII of the *Daley* Compl. and Counts I and IV of the *Weston* Compl.

While this provision provides authority for the removal of a municipal officer, it contemplates only suspension and then only after that officer has been indicted for criminal conduct. Neither of the conditions is contemplated, let alone required, by section 790.33(3)(e), which premises the Governor's authority merely on a judicial determination that a municipal officer has knowingly and willingly violated the preemption set forth in section 790.33(1).

Importantly, the Florida Constitution operates as a limit on governmental power, not a floor. *See e.g., Sun Ins. Office, Ltd. v. Clay, Fla.*, 133 So. 2d 735, 741-42 (Fla. 1961). The Florida Supreme Court has emphasized that these limitations may be found both in express language and by implication. *See, e.g., State ex rel. Church v. Yeats*, 74 Fla. 509, 512 (Fla. 1917). Where the Florida Constitution prescribes the manner in which certain authority may be exercised, that same provision constitutes a prohibition against a different exercise of that authority. *In re Advisory Op. of Gov. Civil Rights*, 306 So. 2d at 523. The Court explained:

> The principle is well established that, where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. . . . Therefore, when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.

Id. at 523 (citations and internal quotation marks omitted); *Bruner*, 384 So. 2d at 1340-41 (holding that the Florida Legislature may not vary from the constitutional allocation of power in the gubernatorial suspension of public officials).[10]

---

[10] Commentary from the 1968 amendments to the Florida Constitution, the source of the current language in section 7(c), further supports this argument. The prior language in Article IV, section 7 was much broader, and provided that the Governor had authority to suspend "all officers appointed or elected, and that were not liable to impeachment." *In re Advisory Op. to Governor-School Bd. Member-Suspension Auth.*, 626 So. 2d 684, 687 (1993). The new version of section 7(c) limited the authority of the Governor to suspend elected municipal officers "only if they have

As the Court held in *Marcus v. Scott*, because the Florida Constitution prescribes the manner in which municipal officers may be removed, the Legislature may not alter those methods through statute. *Marcus*, 2014 WL 3797314, at *3. Consequently, the Court should find the removal provision unconstitutional.

V. THE PENALTY PROVISIONS VIOLATE PLAINTIFFS' SPEECH, ASSOCIATION, AND PETITION RIGHTS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.[11]

The rights protected by the First Amendment to the United States Constitution and Article I, Sections IV and V of the Florida Constitution – free speech, free association, and the right to petition (and in Florida, instruct) legislators – form the cornerstone of democracy. *See, e.g.*, *Citizens United v. F.E.C.*, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people.") (internal citations omitted); *McDonald v. Smith*, 472 U.S. 479, 486 (1985) (right to petition "lie[s] at the base of all civil and political institutions") (Brennan, J., concurring).

These rights are so important that a restriction on them is generally subject to strict scrutiny and upheld only if the government can prove that the restriction is necessary to serve a compelling state interest and is narrowly tailored to serve that interest through the least restrictive means possible. *See, e.g.*, *Fraternal Ord. of Police, Miami Lodge 20 v. City of Miami*, 243 So. 3d 894, 899 (Fla. 2018); *State of Fla. v. J.P.*, 907 So. 2d 1101, 1116 (Fla. 2004). As illustrated by the

---

been indicted for a crime and even that power is subject to a contrary provision in a municipal charter or general law." 26 Fla. Stat. Ann. 101-02, Commentary (1970) (emphasis added). The Commentary continued, "[T]he new constitution . . . limited the broader provision in the 1885 Constitution. Specifically, municipal officers are no longer included in the broad language of the governor's power of suspension but are covered instead, in a limited manner, by Article IV." *Id.* (citing *In re Advisory Op.*, 626 So. 2d at 688).

[11] These claims are asserted in Counts IV and V of the *Daley* Compl. and Counts IV and VII of the *Weston* Compl.

accompanying affidavits, the Penalty Provisions violate Plaintiffs' First Amendment rights in multiple and significant ways.

The Court need look no further than the practical impact of the Penalty Provisions to see their adverse effects on Plaintiffs' rights. In addition to enabling the State to sue local officials and governments and imposing severe penalties on individual officials, the Penalty Provisions also permit any "person or organization whose membership is adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or caused to be enforced in violation of [the Preemption Law]" to sue the local government for actual damages, plus reasonable attorney's fees and costs, including a contingency fee multiplier. § 790.33(3)(f), Fla. Stat. By offering both a financial reward *and* removing the primary hurdle for many litigants – the cost of litigation – the statute incentivizes ideological plaintiffs to sue for any claim, whether meritorious or frivolous. Florida Carry, Inc. ("Florida Carry"), for example, has already brought two lawsuits against local governments – one for taking no action and the other for trying to *comply* with the vague Preemption Law provisions. *See City of Tallahassee*, 212 So. 3d at 452; *Fla. Carry, Inc. v. Broward County*, Case No. CACE 14-8532 (14) (Broward Cir. Ct.); SOF, ¶ 7.[12]

[12] Florida Carry sued the City of Tallahassee and individual city commissioners for failing to repeal void ordinances, even though the city had neither attempted to enforce them nor enacted a new ordinance. *See City of Tallahassee*, 212 So. 3d at 455-56. In fact, the Tallahassee Police Chief had advised all the police that the ordinances were unenforceable. *See id.* at 456. Nevertheless, the statutory reward incentivized Florida Carry to file a lawsuit that both the trial court and the appellate court rejected, wasting taxpayers' money through defending the litigation. *See id.* Florida Carry's legal actions are consistent with the warning on its website that "Communities who continue to break Florida's Firearms Preemption Law will see us soon." *See* https://www.floridacarry.org/issues/firearms-preemption (last visited Feb. 8, 2019).

Similarly, Florida Carry sued Broward County, alleging that certain county ordinances (such as a prohibition on throwing, shooting, or directing any object or lighting in such a manner as to interfere with the safe operation of any aircraft) violate the Preemption Law despite the fact that the county amended the regulations specifically to clarify that the regulation is not applicable to

By both incentivizing ideological lawsuits and imposing severe penalties on local elected officials and governments, the statute intimidates officials, preventing them from passing even constituent-supported ordinances they genuinely believe are not preempted. *See* SOF, ¶¶ 9-12.

The chilling of local officials' abilities to do their job has cascading, adverse effects on Plaintiffs' speech, association, petition, and instruction rights. Citizens and elected officials are less engaged in, and speak less on, gun safety issues because no ordinances on those topics have been put up to vote in city and county commissions and councils. *See* SOF, ¶ 13. Citizens have engaged in less advocacy on these issues than they would have otherwise because such advocacy would not be effective. *See* SOF, ¶ 13. Local elected officials have not sought to convince their colleagues to vote in favor of their preferred gun safety ordinances because they know that any such votes could subject the elected officials and their local government bodies to harsh penalties. *See* SOF, ¶ 14. Citizens and elected officials have been reluctant to form associations for the advancement of local gun safety regulation because doing so would be a fruitless endeavor. *See* SOF, ¶¶ 13-14. And the very local governments that are supposed to represent the citizens of Plaintiff municipalities find themselves chilled from taking any legislative actions to reflect the will of the people. *See* SOF, ¶ 11. These impacts, discussed further below, violate the very essence of the rights protected by the First Amendment and Florida Constitution and render the Penalty Provisions unconstitutional.

A. The Penalty Provisions are Impermissible Content-Based Restrictions that Impair Core Political Speech.

The Supreme Court has described "interactive communication concerning political change" as "core political speech" deserving the highest protection under the Constitution. *Meyer*

---

the extent preempted by Chapter 790. SOF, ¶ 7; *see, e.g.*, Broward Cty. Ordinances §§ 2-39(e); 2-137.1(e).

v. Grant, 486 U.S. 414, 422 (1988). As such, statutes that "limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed." *Id.* at 423. The Supreme Court has also consistently applied strict scrutiny to statutes that are content-based, i.e., that regulate speech based on the content of the topic discussed, "regardless of the government's . . . motive." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015). Taken as a whole, the Penalty Provisions at issue in this case trigger strict scrutiny on both counts. For the reasons explained below, the Penalty Provisions do not survive strict scrutiny.

First, the Penalty Provisions impair core political speech. In *Meyer v. Grant*, the Supreme Court held that a statute limiting citizens' ability to put initiatives on a statewide ballot burdened core political speech both by (1) limiting the number of voices that could convey the citizens' message and (2) making it "less likely that [they would] garner the number of necessary signatures [to have their initiative placed on the ballot], thus limiting their ability to make the matter the focus of statewide discussion." *Meyer*, 486 U.S. at 422–23. The statute at issue in *Meyer* made it a felony for a party to pay solicitors to obtain signatures for a petition, and the threat of punishment precluded the exercise of core political speech. The Supreme Court made clear that "[t]he freedom of speech…guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." *Meyer*, 486 U.S. at 421 (internal citations omitted). So too, here, the Penalty Provisions violate core political speech rights by impeding both the quantum and quality of speech related to gun safety due to the fear of subsequent punishment. Many residents of Plaintiff municipalities are concerned about the rising tide of gun violence across the nation, including the recent mass shooting at Marjory Stoneman Douglas High School in Parkland, Florida. *See* SOF, ¶¶ 4-5. As a result of their concerns, many residents have sought to promote the reasonable

regulation of firearms in their cities and counties through local laws that arguably do not violate the Preemption Law. *See* SOF, ¶ 5.[13]

However, because of the Penalty Provisions, no Plaintiff municipality or local elected official has voted on any ordinances that would actually respond to constituents' concerns on gun safety, although some of Plaintiff municipalities have passed resolutions stating that they would enact such ordinances but for the Penalty Provisions.[14] *See* SOF, ¶¶ 9-12. Citizens like Plaintiff Turkel are in effect deprived of one of the most impactful kinds of direct participation in the lawmaking process – directly addressing city commissions to urge the passage of an ordinance –

---

[13] The fact that section 790.33 professes an intent to "prohibit the enactment of any . . . ordinances or regulations relating to firearms, ammunition, or components thereof," *id.* § 790.33(2)(a), does not prevent the enactment of ordinances that fall outside of the scope of the Preemption Law. *See, e.g.*, *Orange Cty., Fla. v. Singh*, No. SC18-79, 2019 WL 98251, *3 (Fla. Jan. 4, 2019) (ordinance was valid where it was not inconsistent with the statutory preemption law). Indeed, multiple courts in other jurisdictions have found that local firearm safety ordinances were not preempted by broad firearms preemption laws. *See generally, e.g.*, *State v. Phillips*, 63 A.3d 51 (Md. App. 2013) (ordinance requiring convicted gun offenders to register with the Police Commissioner not preempted by state law preempting the purchase, sale, taxation, transfer, manufacture, repair, ownership, possession, and transportation of firearms); *Ore. St. Shooting Ass'n v. Multnomah Cty.*, 858 P.2d 1315 (Or. Ct. App. 1993) (en banc) (provisions of ordinances imposing fees for background checks were not preempted by broad state firearms preemption law); *Cherry v. Municipality of Metro. Seattle*, 808 P.2d 746 (Wash. 1991) (though state law preempted the field of firearms regulation, city ordinance prohibiting municipal employees' possession of firearms while on the job was outside the scope of the preemption and valid).

As noted in the accompanying affidavits, a number of Plaintiff municipalities have passed resolutions reflecting their intent to pass ordinances that would satisfy their constituents' concerns about gun violence and that they believe would not violate section 790.33. *See, e.g.*, SOF, ¶ 12; *see also infra* at Section VIII (permissible regulations the County Plaintiff desire to enact).

[14] The chilling of Plaintiff municipalities and legislators is not surprising given that the stated purpose of the Penalty Provisions is to "deter and prevent" the lawmaking process from happening in the first place. § 790.33(2)(b), Fla. Stat. And organizations like Florida Carry and the NRA have suggested that they will sue whenever an arguably-preempted gun law is enacted. *See, e.g.*, Amicus Br. of NRA, Case No. 2018-CA-000699, at 6-7 (arguing that the point of the Penalty Provisions is to make local legislators hesitate to pass ordinances that may not be preempted, and further noting that "local officials can avoid legal risk simply by not enacting or enforcing laws that *arguably* violate the preemption statute") (emphasis added).

as no local officials are willing to even consider such legislation due to the Penalty Provisions. *See* SOF, ¶¶ 5, 10-11, 13-14. Citizens also inevitably lose the opportunity to make their preferred regulations the focus of robust discussion where there is no chance of a vote no matter how persuasive the advocacy. *See Meyer*, 486 U.S. at 422–23. As the *Meyer* Court recognized, there is a qualitative difference between speech that occurs due to the potential that a law could be passed and the more limited speech that occurs prior to a proposed law being placed before decision-makers. *See id.*

The Penalty Provisions deprive Plaintiff elected officials of their abilities to engage in core political speech for similar reasons. While the Supreme Court has held that legislators do not exercise First Amendment rights through voting on given proposals, *see Carrigan*, 564 U.S. at 125–26, elected officials do exercise First Amendment rights "during the routine course of communications between and among legislators, candidates, citizens, groups active in the political process, the press, and the public at large . . . ." *See id.* at 129-30 (Kennedy, J., concurring). Where no firearm safety ordinances are up for debate – even ordinances that are arguably not preempted – elected officials are deprived of the opportunity to engage with each other on the issues underlying those ordinances, as well as the opportunity to engage with their constituents, the press, and the public at large. Indeed, the only context in which the Plaintiffs have been willing to draft and actually discuss new firearms ordinances and regulations has been in anticipation of this litigation, knowing that these proposals would not be put up for a vote for enactment unless and until the Penalty Provisions were declared invalid. This deprivation violates the First Amendment. *See id.*; *see also, e.g.*, *Bond v. Floyd*, 385 U.S. 116, 135–36 (1966) ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.").

Second, the Penalty Provisions are impermissibly content-based. The Penalty Provisions single out legislation on firearms and its accompanying speech for punishment – officials would not be subject to penalties for passing ordinances related to other topics, whether preempted or not. In so doing, the statute regulates speech based on content and is presumptively invalid under strict scrutiny principles. *See, e.g.*, *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1300 (11th Cir. 2017); *accord R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Nothing about the statute overcomes its presumptive invalidity. Preventing the adoption of arguably valid laws (regardless of whether a government entity or anti-gun-regulation plaintiff might want to challenge those laws as being preempted) is not a compelling state interest, nor is the statute necessary or narrowly tailored to serve that interest through the least restrictive means available. *See Fraternal Ord. of Police*, 243 So. 3d at 899. The remedy for local enactment of an ordinance that is preempted by or conflicts with a state statute is a judicial proceeding to have the local legislation invalidated.[15] Indeed, that judicial remedy remains the remedy for every other arguably preempted or conflicted law in Florida (such as local ordinances relating to alcoholic beverages or air quality); it is only the Penalty Provisions that single out local elected officials and municipalities for severe penalties for acting in accordance with their constituents' wishes with respect to firearms.

When the Preemption Law was amended to add the Penalty Provisions in 2011, the final bill analysis stated that the harsh penalties were needed due to local governments' continued attempts to regulate firearms despite the state's preemption of local firearm regulation. *See* SOF,

[15] In fact, the Preemption Law, itself, contemplates injunctive relief for violations of the law. *See* § 790.33(3)(b), Fla. Stat. ("If any … local government violates this section, the court shall declare the improper ordinance, regulation, or rule invalid and issue a permanent injunction against the local government prohibiting it from enforcing such ordinance, regulation, or rule.").

Ex. 19 (Final Bill Analysis, H.B. 45) at 2-3. But the examples that the legislature cited in support of this claim show that the preemption statute was already accomplishing its goals without the need for penalties.[16] No examples were provided of cities passing or attempting to pass ordinances that they knew or thought to be preempted. *See generally* Final Bill Analysis. And prior to the enactment of the Penalty Provisions, the State of Florida had never found that judicial remedy to be insufficient to achieve its interests in ensuring uniformity in certain statewide legislation.

In short, the Penalty Provisions are neither necessary nor the least restrictive means available for enforcing the Preemption Law. The Florida Legislature is not permitted to foreclose important debates through the threatened imposition of severe penalties. Nor is the legislature permitted to effectively foreclose Florida courts from resolving a legal question (i.e., whether a given local ordinance is preempted) by making sure that the question is never raised. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) (laws may not "seek[] to prohibit the analysis of certain legal issues and . . . truncate presentation to the courts"). If the State (or a private party) genuinely believes that an ordinance is preempted, it can file suit and let the courts decide. Under no circumstances, however, is the legislature entitled to preclude speech and debate over the validity of a given law through the adoption of penalties so severe that the issue is virtually certain not to come up.

---

[16] According to the Final Bill Analysis, Palm Beach County "considered an ordinance banning high capacity ammunition clips, but rescinded from consideration because of the preemption." SOF, Ex. 19 (Final Bill Analysis) at 3 n.14. Lee County rescinded its ban on firearms in city parks on account of the Preemption Law. *See id.* at 3 n.13; *accord* Lee Cty. Ordinance 10-41 (Oct. 26, 2010) (repealing ban in order to "recognize and provide consistency with the provisions of Florida Statutes Chapter 790"). And the City of South Miami's ordinance requiring locking devices on firearms was passed in good faith, with the support of the Attorney General's opinion that it did not conflict with the preemption statute, and was voided when a court found it to be preempted. SOF, Ex. 19 (Final Bill Analysis) at 2; *N.R.A. v. City of S. Miami*, 812 So. 2d 504, 505-06 (Fla. 3d DCA 2002).

B. The Penalty Provisions Impair Associational Rights.

The Penalty Provisions violate Plaintiffs' associational rights for similar reasons. The right of association stems from the Supreme Court's "recognition that effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *Buckley v. Valeo,* 424 U.S. 1, 15 (1976) (internal citations omitted). The Supreme Court has thus "made it clear that the right of citizens to band together in promoting . . . their political views is among the First Amendment's most pressing concerns." *Carrigan,* 564 U.S. at 131 (Kennedy, J., concurring). The "constitutionality of a law prohibiting a legislative or executive official from voting on matters advanced by or associated with a political supporter is, therefore, a most serious matter from the standpoint of the logical and inevitable burden on speech and association that preceded the vote." *Id.* Where laws have the practical effect of impairing the value of such association, they violate the right of association regardless of whether the restriction was the goal of the statute. *See, e.g., United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints . . . .").

The Penalty Provisions impair constituents' rights to band together to seek change at the local level. While Plaintiff Turkel wants to form a group capable of persuading legislators to pass the restrictions she desires, she is chilled from doing so because none of her local legislators are willing to advocate on behalf of her policy objectives – including proposals that are arguably not preempted – because of potential exposure to the Penalty Provisions. *See* SOF, ¶ 5(a). The Penalty Provisions further impair elected officials' ability to form associations with like-minded colleagues to achieve their policy goals. *See* SOF, ¶ 14. The right to associate to achieve political goals, and the speech that accompanies an association's work, are "undoubtedly" protected by the First Amendment. *See Carrigan*, 564 U.S. at 129 (Kennedy, J., concurring). As the statute impairs

these rights and fails the strict scrutiny test for the reasons described above, it should be struck down.

C. The Penalty Provisions Impede the Rights to Petition and Instruct.

The Penalty Provisions also impede the constitutional right to petition the government for redress of grievances. The right to petition is "inherent and absolute," *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 843 (Fla. 1993), and is a necessary component of ensuring that the government is accountable to the people, "which is the bedrock of American democracy." *Reynolds v. State*, 576 So. 2d 1300, 1302 (Fla. 1991).

The Florida Constitution provides even greater rights of access to local officials than the federal Constitution, securing to Florida citizens not only the right to petition the government for redress of grievances but also the right to "instruct their representatives." Art. I, § 5, Fla. Const. (discussing the rights to petition *and* instruct); *Strand v. Escambia Cty.*, 992 So. 2d 150, 163 (Fla. 2008) (noting that the Florida Constitution cannot be interpreted in a manner that renders any term superfluous).

While there is little Florida case law addressing the limits of the right to instruct, the Florida Supreme Court has noted that in the redistricting context, the right to instruct provides Floridians a right to make their opinions heard that is coextensive with the right of the Florida Legislature to apportion legislative districts. *See In re Senate Joint Res. of Leg. Apportionment 1176*, 83 So. 3d 597, 603 (Fla. 2012) ("[W]hile the Florida Constitution grants the Legislature the authority to apportion the legislative districts . . . , the authority is circumscribed by the right of the people to instruct their representatives on the manner in which [it] should be conducted.").

The rights to petition and instruct *local* legislators and governments are particularly important because citizens have the greatest access to their elected officials at the local level and because local issues have a direct effect on those citizens. The First District Court of Appeal has

recognized the importance of such local self-governance, noting that shifting regulatory authority from the local level to the state level "touches sensibilities as old as the Revolution itself, because it affects the right of access to government the right of the people effectively 'to instruct their representatives, and to petition for redress of grievances' on which other cherished rights ultimately depend." *Cross Key Waterways v. Askew*, 351 So. 2d 1062, 1065 (Fla. 1st DCA 1977); *see also* SOF, ¶¶ 13-14.

The Penalty Provisions unconstitutionally interfere with the rights to petition and instruct. Following the adoption of the Penalty Provisions, Plaintiff Turkel has been rebuffed by her local legislators every time that she has attempted to contact them to take action to prevent gun violence. *See* SOF, ¶ 5(a). They are simply unwilling to consider enactment of even those regulations that are likely not preempted for fear that they might be found preempted, subjecting the legislator or the local government to the Penalty Provisions. *See* SOF, ¶¶ 10-12. Where legislators are unwilling to even consider an ordinance due to the severity of the Penalty Provisions, the right to petition is abridged. *See, e.g.*, *United Mine Workers, Dist. 12*, 389 U.S. at 222 (statute that indirectly impairs First Amendment rights violates First Amendment); *cf. Evans v. Romer*, 854 P.2d 1270, 1276-84 (Colo. 1993), *cert. denied*, 510 U.S. 959 (1993) (amendment to Colorado Constitution that prohibited enactment of statutes and ordinances giving gay Coloradans protected status was subject to strict scrutiny because it infringed on Coloradans' right to participate equally in the political process by limiting their ability to implement legislation through the normal political process). The Penalty Provisions make the petition for redress of grievances through normal political means impossible and thus further infringes upon citizens' constitutional rights. The Penalty Provisions should also be struck down on these additional grounds.

D. The Penalty Provisions are Overly Broad.

"The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002). "In the context of the First Amendment, an overbroad statute is one that restricts protected speech or conduct along with unprotected speech or conduct." *Montgomery v. State*, 69 So. 3d 1023, 1029 (Fla. 5th DCA 2011); *see also NAACP v. Button*, 371 U.S. 415, 433 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."). Under the overbreadth doctrine, litigants "are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Doe v. Mortham*, 708 So. 2d 929, 931 (Fla. 1998).

Here, the Penalty Provisions were passed with the express purpose of deterring and preventing the violation of section 790.33. § 790.33(2), Fla. Stat. However, as explained previously, the actual effect of the severe Penalty Provisions has been far greater. Based solely on the existence of the Penalty Provisions, both constituents and their representatives have generally refrained from communicating about common-sense firearm regulations to make their communities safer, even if those measures are arguably not preempted by section 790.33(1). SOF, ¶¶ 5, 9-11. Furthermore, because these potential measures are silenced before they are engaged, local legislators are necessarily restricted from voting on such measures as well. As such, the Penalty Provisions are unconstitutionally overbroad because they chill a substantial amount of protected speech (public and private discourse), as well as unprotected speech or conduct (voting).

In sum, because the overly broad Penalty Provisions are impermissible content-based restrictions on core political speech, and impede association rights, petition rights, and the right to instruct, they violate the First Amendment and the Florida Constitution.

VI. THE PREEMPTION LAW IS VOID FOR VAGUENESS.[17]

The Preemption Law is not simply poorly drafted: it is baffling. It provides no definite warning as to what conduct it prohibits or to whom it applies, forcing local legislators to guess as to its meaning, inviting arbitrary enforcement by both the government and private parties, and leaving it to the courts to do the Legislature's job of stating who should be penalized for what.

As evidenced in the accompanying affidavits, while the Municipal and County Plaintiffs and their elected officials wish to enact gun-related ordinances they believe are not preempted, they have refrained from doing so out of fear that state officials or private parties might decide otherwise, thereby exposing themselves to the Penalty Provisions. SOF, ¶¶ 10-12. Forcing local officials to guess at what they may or may not do contradicts fundamental notions of due process.

Due process requires that "the Legislature, in the promulgation of a penal statute, use[] language sufficiently definite to apprise those to whom it applies what conduct on their part is prohibited. . . . To force one to act at one's peril is against the very foundation of our American system of jurisprudence." *State v. Wershow*, 343 So. 2d 605, 608-09 (Fla. 1977). As the Supreme Court has long-since established, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926). The Legislature must "define the offense in a manner that does

[17] This claim is asserted in Count V of the *Weston* Compl., Count VI of the *Daley* Compl., and Count V of the *Counties* Compl.

not encourage arbitrary and discriminatory enforcement." *State v. Mark Marks, P.A.*, 698 So. 2d 533, 537 (Fla. 1997). "The void-for-vagueness doctrine serves two central purposes: (1) to provide fair notice of prohibitions, so that individuals may steer clear of unlawful conduct; and (2) to prevent arbitrary and discriminatory enforcement of laws." *Mason v. Fla. Bar*, 208 F.3d 952, 959 (11th Cir. 2000).

When construing penal legislation such as the Preemption Law against an attack of vagueness, any doubt should be resolved against the State. *Wershow*, 343 So. 2d at 608. "Penal statutes" are those that impose punitive measures, criminal or civil. *See Liner v. Workers Temp. Staffing, Inc.*, 990 So. 2d 473, 477 (Fla. 2008) (finding a law penal in nature because of its "potentially extreme punitive damages" of at least $1,000 per violation); *Diaz de la Portilla v. Fla. Elections Comm'n*, 857 So. 2d 913, 917-18 (Fla. 3d DCA 2003) (affirming that a law imposing a $1,000 fine on prohibited activity and that would have a ruinous effect on a candidate's reputation was penal in nature); *Galbut v. City of Miami Beach*, 605 So. 2d 466, 467 (Fla. 3d DCA 1992) (finding law that imposed $5,000 civil penalty and removal from office was penal in nature). The harshness of the Penalty Provisions – including potential removal from office, $5,000 fines, denial of legal fees to defend against suit, and governmental liability for damages of up to $100,000 (plus uncapped attorneys' fees) – demonstrates that the statute is penal in nature.[18]

Moreover, section 790.33(2)(b) states that "[i]t is . . . the intent of this section to deter" – one of the "traditional aims of punishment." § 790.33(2)(b), Fla. Stat.; *see Charles v. State*, 204 So. 3d 63, 66 (Fla. 4th DCA 2016) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963)). Further evidencing its penal aspect, the statute is codified within the Florida Criminal

[18] Furthermore, under section 790.335, relating to prohibition of the registration of firearms, a government entity may be fined up to $5 million for a single violation. § 790.335(4)(c), Fla. Stat.

Code (Florida Statutes, Title XLVI, Crimes). Therefore, due to the harsh, penal nature of the Penalty Provisions, section 790.33 must "convey[] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *See Brown v. State*, 629 So. 2d 841, 842 (Fla. 1994). Contrary to this requirement, the Preemption Law and Penalty Provisions do not give reasonable notice as to *what* they prohibit or to *whom* they apply.[19]

A. The Preemption Law is Vague as to What It Prohibits

The Preemption Law is unconstitutionally vague as to what it prohibits due to three internal inconsistencies. First, the opening section, Section 790.33(3)(a), states that the penalties apply if the preemption described in subsection (1) is violated. Subsection (1) states the State is occupying "the whole field of regulation of firearms and ammunition." Clearly, the statute does not prohibit local governments from enacting ordinances and regulations affecting things *other* than "firearms and ammunition." Perplexingly, however, the intent provision of the statute refers to the preemption of "firearms, ammunition, or *components* thereof," §§ 790.33(2)(a) and (b), Fla. Stat. (emphasis added), despite the fact that the word "components" is not defined or even mentioned in the preemption subsection.

This conflict between the express scope of the preemption and the stated "intent" of the statute renders section 790.33 unconstitutionally vague. Elected officials are without notice as to whether regulation of "components" is forbidden by the statute, or indeed, since "components" is

---

[19] In addition, as discussed in Section VI of this memorandum, the Penalty Provisions implicate First Amendment concerns. Thus, it is subject to a "more stringent vagueness test" and, as the Florida Supreme Court has established, requires "more precision in drafting." *Sult v. State*, 906 So. 2d 1013, 1031-32 (Fla. 2005); *see also Colautti v. Franklin*, 439 U.S. 379, 390 (1979) (stating that a law that "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" is unconstitutionally vague and that "[t]his appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights") (quoting *United States v. Harriss*, 347 U.S. 612, 617-18 (1954)).

not even defined, what the Legislature intended the term to mean. *See Orange Cty., Fla.*, 2019 WL 98251 at *3 (stating a county was not preempted from requiring non-partisan elections of constitutional officers, despite the Florida Election Code purporting to preempt "all matters" set forth in the Code, because partisan elections of constitutional officers were not "set forth" in the Code).

For example, a number of Plaintiffs have supported or adopted resolutions stating they wish to enact ordinances prohibiting the sale or transfer of aftermarket large capacity detachable magazines, which hold more than ten rounds of ammunition, are sold separately from the firearm, and may be removed from the firearm without disassembling it. However, they have refrained from doing so even where they clearly have majority support, because others may argue that this type of magazine – commonly referred to as an "accessory" – comes within the statute's preemption of the regulation of "firearms, ammunition, or *components thereof.*" § 790.33(2)(a)-(b), Fla. Stat. (emphasis added); SOF, ¶ 10-12.

Second, the "prohibition" section of the statute, subsection (3)(a), purports to prohibit <u>three</u> actions: "enacting or causing to be enforced any local *ordinance* or administrative *rule* or *regulation* impinging upon [the Legislature's occupation of the whole field of regulation of firearms and ammunition]." § 790.33, Fla. Stat. (emphasis added); *see City of Tallahassee*, 212 So. 3d at 457 (noting that in enacting the Preemption Law, the Legislature was concerned with prohibiting "an act of legislation or law"). In contrast, section 790.33(3)(f) states that individuals may sue for damages caused by <u>five different</u> actions: any "measure," "directive," "enactment," "order," or "policy" promulgated or caused to be enforced in violation of the section. § 790.33(3)(f), Fla. Stat.; *see Fla. Carry, Inc. v. Thrasher*, 248 So. 3d 253, 260-61 (Fla. 1st DCA 2018) (permitting a challenge based upon a university's student conduct code, without considering

whether the student conduct code was an ordinance, rule, or regulation); *Fla. Carry, Inc. v. Univ. of Fla.*, 180 So. 3d 137, 151 (Fla. 1st DCA 2015) ("UF") (considering a challenge to university housing policies without considering whether the housing policy was an ordinance, rule, or regulation); *cf. City of Tallahassee*, 212 So. 3d at 458 (addressing a distinct issue regarding the word "promulgate," but not reaching whether the preempted action includes conduct other than an ordinance, rule, or regulation).

"It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *Hechtman v. Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003). At the same time, however, it is a basic principle of statutory construction that the inclusion of some implies the exclusion of others. *Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996) ("Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another."). Thus, although subsection (3)(a) states that only ordinances, administrative rules, and regulations are prohibited, the additional language in subsection (3)(f) is different and far broader, leaving Plaintiffs to speculate as to what the Legislature might have meant and whether the scope of the preemption also applies to any "measure," "directive," "enactment," "order," or "policy."

Plaintiffs cannot determine whether, for example, acting in their capacity as a proprietor like any other private property owner, they could lawfully adopt an internal policy not to lease space in public buildings to gun-related businesses for the sole purpose of displaying or selling firearms. SOF, ¶ 12. Although only an internal policy, that policy might be viewed as a "rule" or "regulation" for which section 790.33(3)(f) provides third parties with standing to sue and thus potentially subjecting the local government and its officials to onerous penalties.

Third, section 790.33(3)(d) is similarly illogical and not susceptible to practical construction. It prohibits the use of public funds to "defend" unlawful conduct of any person found to have knowingly and willfully violated the statute. However, any such "defense" necessarily *precedes* a finding of a knowing and willful violation, and thus requires Plaintiffs to speculate or gamble as to whether the use of public funds to contest and preclude such a finding is permissible (i.e., whether the alleged violation may ultimately be found to be knowing and willful). *See also Attorney General's Response in Opp. to Defendants' Proposed Order on Summary Judgment Motions* ("Attorney General Brief") at 8, No. 2014CA001168, 2015 WL 13613426, *Florida Carry, Inc. v. City of Tallahassee* (Fla. 2d Jud. Cir. Ct. Sept. 8, 2015) (contending that "[w]hether defendants acted in good faith, or upon advice of counsel, is logically irrelevant to whether their actions were knowing and willful"). In sum, Plaintiffs cannot determine what, if anything, this section prohibits.

B. The Preemption Law is Vague as to Whom It Applies.

Although section 790.33(3)(a) applies only to *the enactment* or *enforcement* of ordinances, rules, and regulations (thus apparently applying to those who are responsible for enacting or enforcing such ordinances, rules, and regulations), the provision imposing fines goes further, penalizing those officials "under whose jurisdiction the violation occurs." § 790.33(3)(a), (c), Fla. Stat. Reading these provisions together, as one must, leads to inextricable conflict. Governmental and legislative bodies enact and cause the enforcement of ordinances, rules, and regulations, but an individual local elected official has no *jurisdiction* over anything. *See* § 125.01(1)(t), Fla. Stat. (vesting in the "governing body of the county" the authority to adopt ordinances and resolutions);

§ 166.041, Fla. Stat. (establishing the method for the governing body of a municipality to adopt municipal ordinances and resolutions).[20]

Local officials, then, are left without any indication of what actions will expose them to liability and the looming threat of enforcement. Such a situation is precisely what the prohibition against vague laws protects against. *See Se. Fisheries Ass'n v. Dep't of Natural Res.*, 453 So. 2d 1351, 1353 (Fla. 1984) ("A vague statute is one that fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may also invite arbitrary and discriminatory enforcement.").

The requirement that violations be "willful and knowing" does not save the Preemption Law. The Florida Supreme Court has held that a scienter or specific intent requirement will save a law "from the objection that it punishes without warning an offense of which the accused was unaware . . . only where the statute forbids a clear and definite act." *Mark Marks, P.A.*, 698 So. 2d at 538. Here, as discussed above, Plaintiffs cannot determine what the law prohibits or to whom

---

[20] Section 790.33(3)(c) purports to penalize anyone acting in an official capacity for an entity that enacts prohibited regulations. § 790.33(3)(c), Fla. Stat. This is irrational: no *individual* official, whether elected or appointed, enacts regulation – the governing body as a whole does. *See* §§ 125.01(1)(t), 166.041, Fla. Stat. To hold an individual elected official, who does not individually violate section 790.33(3)(a), liable for the actions of a separate entity that the official cannot control defies reason.

Furthermore, if section 790.33(3)(a) applies to individual local elected officials, it is unclear to which individuals it would apply. Does it apply only to those who vote *for* preempted legislation, or would it (as the plain language seems to imply) also apply to those who vote in the minority *against* the challenged legislation? On their face, the penalties may be levied against any official of a governing entity that passes a preempted ordinance, regardless of what role the individual took in its passage. Because Florida law requires that all members of a body present at a meeting must generally vote on all official action (*see* § 286.012, Fla. Stat.) and official action requires a quorum be present, an elected official present at a meeting during which preempted legislation is considered might be liable and subject to removal for participating in the enactment of the preempted legislation – even if the official voted *against* said legislation (or even if the official abstained from voting due to an apparent conflict).

it applies, and therefore the scienter requirement does not rescue the law from being unconstitutionally vague. *Cf.* Attorney General Brief at 8 (contending that acting on advice of counsel is "logically irrelevant" to whether the action is knowing and willful).

The Preemption Law's vagueness results in an improper delegation of legislative power to the courts and the State. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."). As a practical matter, this requires local governments to engage in a regular game of "Mother may I?" wherein local governments and officials will need to go to the courts any time legislation (or even a policy statement) is contemplated to get the court's blessing (presumably, through the appellate stage) to avoid the possibility of harsh, unpredictable penalties. As a result of the uncertainty created by the statute, the County Plaintiffs have asserted four separate causes of action seeking declaratory judgment that certain actions are not preempted. *See infra* Section VIII; *Counties* Compl. at Counts VII-X. Furthermore, as demonstrated by the accompanying affidavits and resolutions, various Plaintiffs seek to enact a panoply of measures, including:

- Requiring procedures or documentation to ensure compliance with mandatory waiting periods and criminal history background checks;
- Requiring the reporting of failed background checks;
- Prohibiting the sale or transfer of certain after-market, large-capacity detachable magazines;
- Restricting the possession, display, or sale of firearms in government-owned or government-operated facilities and locations;
- Requiring notices at government-owned or government-operated facilities either prohibiting firearms or encouraging patrons not to carry firearms while on site; and
- Precluding firearms on a year-round basis in certain areas specified as statutory exceptions to permissible concealed weapons, including polling places or school administration buildings.

See SOF, ¶¶ 10-13, Ex. 18; *Daley* Compl. at ¶¶ 46-54; *see also infra* at Section VIII.

In each such case, the court would need to guess as to the Preemption Law's meaning, leading to potentially inconsistent results. This violates separation of powers principles, which hold that the Legislature may not leave it to the courts to "amend a statute by construction in order to bring the statute within the fundamental law." *Whitaker v. Dep't of Ins. & Treasurer*, 680 So. 2d 528, 531 (Fla. 1st DCA 1996). Nor can the Legislature leave it to "the fancy of the enforcing agency," as it has done here, inviting arbitrary and potentially politically motivated action by the State. *Id.* at 532.

The Preemption Law fails to provide those it regulates with guidance as to how to comply with its dictates and avoid the harsh penal damages attendant to its violation. Simply put, it is a mess of inconsistent language, contradictions, and nonsensical requirements. Therefore, this Court should strike down as unconstitutional the Penalty Provisions due to the vagueness of the Preemption Law provisions.

VII. THE PENALTY PROVISIONS HAVE THE EFFECT OF REWRITING ANTECEDENT CONTRACTS IN VIOLATION OF ARTICLE I, SECTION 10, OF THE FLORIDA CONSTITUTION.[21]

The Penalty Provisions enacted in 2011 substantively alter the terms of the 2008 Employment Contract ("Broward Contract") between Broward County and its employee, Bertha Henry, the Broward County Administrator, as well as the pre-existing June 10, 2011 Employment Contract ("Leon Contract") between Leon County and its employee, Vincent S. Long, the Leon County Administrator. SOF, ¶ 15. The unnecessary Penalty Provisions fail to serve a public purpose that overcomes the State's intrusion into private contractual relationships.

[21] This claim is asserted in Count II of the *Counties* Compl.

The Florida Constitution provides that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed." Art. I, §10, Fla. Const. Although a similar provision exists in the United States Constitution in Article I, Section 10, "[t]he Florida Constitution offers greater protection for the rights derived from the Contract Clause than the United States Constitution." *Sears, Roebuck & Co.*, 223 So. 3d at 299. To find an impairment of contract, "[t]otal destruction of contractual expectations is not necessary," but rather, "[a]ny legislative action which diminishes the value of a contract is repugnant to and inhibited by the Constitution." *Id.* (quoting *In re Advisory Op. to Gov.*, 509 So. 2d 292, 299 (Fla. 1987)). Indeed, in Florida "virtually no degree of contract impairment is tolerable." *See Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1191 (Fla. 2017) (quotations omitted) [hereinafter, *Searcy*] (quoting *Pomponio v. Calridge of Pompano Condo., Inc.*, 378 So. 2d 774, 780 (Fla. 1979)).

Under the *Pomponio* test, the Court must determine "whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the State's objective, or whether it unreasonably intrudes into the parties' bargain to a degree greater than is necessary to achieve that objective." *Pomponio*, 378 So. 2d at 780. "An impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. However, where the impairment is severe, '[t]he severity of the impairment is said to increase the level of scrutiny to which the legislation will be subjected.'" *Searcy*, 209 So. 3d at 1192 (quoting *U.S. Fid. & Guar. Co. v. Dep't of Ins.*, 453 So. 2d 1355, 1360 (Fla. 1984)) (some citations omitted).

The Penalty Provisions, enacted in 2011, impair several aspects of both the Broward Contract and Leon Contract, which were entered into in 2008 and 2011 respectively. *See* SOF, ¶ 15. Both the Broward Contract and the Leon Contract indicate that County Administrator

"serves at the pleasure" of the Board. Broward Contract at § 2.3; Leon Contract at § 5(A). No other removal mechanism is mentioned in either contract. But in contravention of both contracts, the Penalty Provisions state that violation of the Preemption Law "shall be cause for termination of employment or contract or removal from office *by the Governor*." § 790.33(3)(e), Fla. Stat. (emphasis added).

Additionally, both the Broward Contract and the Leon Contract require indemnification and defense of the County Administrator. Broward Contract at § 14.1; Leon Contract at § 4(b). Section 790.33(3)(d) substantially impairs these provisions as it prohibits any public funds to defend or reimburse "any person found to have knowingly and willfully" violated the Preemption Law.

Neither the Broward nor Leon Counties or their respective County Administrators bargained for these changes. The Penalty Provisions destroy these contracted for relationships, effectively rewriting the terms of the contracts. *See Sears, Roebuck & Co.*, 223 So. 3d at 300 (finding that a government regulation resulted in the diminishment of a preexisting contract because it essentially rewrote the agreement through governmental regulation).

As discussed above, *see supra* Section V.A., the Penalty Provisions were wholly unnecessary to prevent the passage of preempted legislation. Consequently, the policy goals of the Penalty Provisions are neither "significant" nor "legitimate" because the Penalty Provisions are not necessary to enforce the Preemption Law. *See id.* at 300 (finding a city's impairment of contract was unnecessary when existing land use regulations already accomplished the city's purported public purpose).

Therefore, the Court should find that the Penalty Provisions unconstitutionally impair the contracts between Broward and Leon Counties and their respective County Administrator.

VIII. THE PLAINTIFFS ARE ENTITLED TO DECLARATORY JUDGMENT THAT CERTAIN PROPOSED REGULATIONS ARE PERMISSIBLE.[22]

If the Court determines that any of the Penalty Provisions are constitutional, then Plaintiffs seek and are entitled to summary judgment on their claims for declaratory judgment that certain actions are permissible and not preempted. All of the requisite elements for declaratory relief are met. *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991).

A. The Counties are Entitled to Enforce the Local Option Regulation Including Imposition of Record Retention Requirements (Count VII).

Broward County, Miami-Dade County, and Leon County are charter counties. *See* Art. VIII, §§ 1(g), 11, Fla. Const. The Florida Constitution specifically permits charter counties to adopt a waiting period and criminal history records check in connection with the sale of firearms:

> Each 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. For purposes of this subsection, the term "sale" means the transfer of money or other valuable consideration for any firearm when any part of the transaction is conducted on property to which the public has the right of access. Holders of a concealed weapons permit as prescribed by general law shall not be subject to the provisions of this subsection when purchasing a firearm.

Fla. Const. art. VIII, § 5(b) (the "Local Option"). Each of the three Counties has exercised this constitutionally-permitted power. *See* § 18-96, Broward County Code of Ordinances; § 21-20.18, Miami-Dade County Code of Ordinances; §§ 12-81 through 12-88, Leon County Code of Ordinances.[23]

---

[22] These claims are asserted in Counts VII through X of the *Counties* Complaint and Count VI of the *Weston* Complaint. If the Court declares the unconstitutionality of *all* of the Penalty Provisions, then the Court need not consider this section, which is presented in the alternative.

[23] Only Leon County has a generally stated regulation permitting enforcement. The ordinance enacted by Leon County expressly provides generally for enforcement: "Law enforcement officers and code inspectors shall enforce the provisions of this section against any person found violating these provisions within their jurisdiction." § 12-87, Leon County Code of Ordinances.

The Local Option power necessarily includes the power to enforce it through reasonable regulation. *See Molwin Inv. Co. v. Turner*, 167 So. 33, 33 (Fla. 1936) ("An express power duly conferred may include implied authority to use means necessary to make the express power effective . . . ."); *see also* § 125.01(1)(t), Fla. Stat. A constitutional power, such as the Local Option, cannot be "enlarged or abridged by the Legislature."[24] *State ex rel. Buckwalter v. City of Lakeland*, 150 So. 508, 512 (1933); *cf. Brinson v. Tharin*, 99 Fla. 696, 702 (1930) (power to issue common law writ of certiorari vested in the Court by the Constitution could not be extended or limited by statute).

Enforcement of a waiting period logically requires documentation demonstrating the specific details of the purchase, including the date and time of the transaction. Thus, the Counties are entitled to take certain actions to execute their Local Option Provisions, namely:

a. Requiring documentation of compliance with the waiting period showing the date and hour of the firearm sale and the date and hour of the firearm transfer or receipt;
b. Requiring documentation of compliance with the required criminal records history check showing the unique approval number obtained from the inquiry to the Department of Law Enforcement;
c. Requiring posting of conspicuous signs throughout gun shows on County-owned property and written notice to all dealers of the requirements of background screenings and the applicable waiting period;
d. Requiring that guns brought into gun shows on County-owned property be tagged, or providing the purchaser with an electronic token, so that, upon exiting, the operator can confirm compliance with the required waiting period and background check; and
e. Limiting 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.

[24] Generally, however, counties can be preempted by the Legislature and may not enact ordinances in conflict with state law. *Phantom of Brevard, Inc. v. Brevard County*, 3 So. 3d 309, 314 (Fla. 2008). But because the Florida Constitution provides for the Local Option power, such power cannot be preempted or prohibited by the State.

Unless the Counties can require that firearm sellers maintain documentation demonstrating compliance with the waiting period and the criminal history records check requirement, the Counties' permitted regulation under the Local Option Provision is a nullity as Counties would be unable to effectively enforce it. A constitutional power cannot be without meaning. *See Zingale v. Powell*, 885 So. 2d 277, 282 (Fla. 2004) (stating a constitutional provision "must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied"); *Advisory Op. to Gov.–1996 Am. 5 (Everglades)*, 706 So. 2d 278, (Fla. 1997) (same).

Thus, statutory construction requires reading the Local Option (including the inherent power to enforce such Local Option) and section 790.335 consistent with each other. The only consistent reading that gives full effect to both provisions is to allow Counties to require appropriate procedures or documentation so that Counties can enforce the waiting period and background check requirement so long as those enforcement provisions do not require documentation of privately owned firearms or owners of privately-owned firearms.[25]

Therefore, as a matter of law, the Counties are entitled to a declaration that the proposed methods of enforcement referenced above are permissible.

B. The Counties and Municipalities Have Proprietary Authority to Regulate Firearms in Government-Owned or Operated Facilities (*Counties* Count VIII; *Weston* Count VI).

Counties and municipalities have proprietary powers in addition to their regulatory police powers. The Counties and municipalities own or operate various facilities and locations, including, but not limited to, the Broward County Convention Center and the Miami-Dade County

[25] Section 790.335(3)(e) specifically provides that the exceptions to the registry prohibitions should not be construed to allow the maintaining of records of names of purchasers or transferees or records of firearm transactions. § 790.335(3)(e)(2), Fla. Stat. This subsection is not an additional prohibition on records, but merely a clarification of the limited scope of the exception stated in (e)(1).

Auditorium. *See* SOF, ¶ 16. Additionally, the Counties and municipalities own or operate transportation services, such as buses, as well as act as landlords, leasing, and licensing the use of various properties they own. *Id.*

In each of these instances, the Counties and municipalities are acting as market participants, performing functions outside of their capacity as regulators, and, accordingly, are generally viewed under the law as private market participants. *See, e.g., Building & Const. Trades Council of Metro. Dist. v. Assoc. Builders & Contractors of Mass./Rhode Island, Inc.*, 507 U.S. 218, 226-27 (1993) (finding that governmental entities are not subject to preemption when acting within a zone of market freedom as the owner or manager of property); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (holding that government acting as a market participant could discriminate against out-of-state residents); *Volusia Cty. v. Daytona Beach Racing & Rec. Facilities Dist.*, 341 So. 2d 498, 502 (Fla. 1976) (holding that for-profit racetrack leasing government land was subject to taxation because it was not serving a public purpose).

The plain language of the Preemption Law does not preempt or restrict local governments' proprietary authority over their own property.[26] *See, e.g., Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005) ("When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain

[26] Even if the Court were to find the statute ambiguous, the Counties and municipalities are still entitled to a declaration that the proposed regulation is outside the scope of the Preemption Law based upon legislative history. The initial version of the 2011 amendment to section 790.33 prohibited political subdivisions from "regulat[ing] or attempt[ing] to regulate firearms or ammunition in any manner" including by "*exercise of proprietary authority . . . .*" *See* SOF, Ex. 20, H.B. 45, 22nd Leg. 1st Reg. Sess. (Fla. 2011) (emphasis added). The 2011 amendment excludes all reference to the "exercise of proprietary authority," showing that the Legislature did not intend to limit local government's exercise of proprietary authority. *See, e.g., State v. Jones*, 625 So. 2d 821, 825-26 (Fla. 1993) (stating that language was removed from a draft of a later enacted bill was evidence of legislative intent).

intent."). Indeed, the First District identified in *City of Tallahassee* that the Legislature was "primarily concerned with the enactment of local regulations and ordinances in the field of firearms regulation," and nothing in section 790.33, Florida Statutes, refers in any way to local governments acting as proprietors. *City of Tallahassee*, 212 So. 3d at 463. Consequently, the Legislature did not expressly preempt proprietary activities. *See id.*; *Orange Cty., Fla.*, 2019 WL 98251 at *3.

The Counties and municipalities seek to exercise their proprietary authority – not regulatory authority – to restrict or prohibit firearms and ammunition from government-owned or government-operated properties and locations, including to elect not to allow gun shows at those facilities. SOF, ¶ 5; Henry Decl., Ex. A; Gimenez Aff., ¶¶ 6-7. The Preemption Law does not appear to preclude such action. Therefore, the Court should find that the Counties and municipalities are entitled to a declaration that such policies are outside the scope of the Preemption Law. *See Counties* Compl., Ex. A (Proposed Ordinance at § 18-96); *Weston* Compl., Count VI.

C. The Counties are Entitled to Regulate Firearms in Statutorily-Specified Locations (Count IX).

Under Florida law, open carry of firearms is generally prohibited (§ 790.053(1), Fla. Stat.) while concealed carry is permitted subject to certain exceptions (§ 790.06, Fla. Stat.). Section 790.06(12)(a) precludes concealed carry at various locations, including a "place of nuisance," a "polling place," a "meeting of the governing body of a county, public school district, municipality, or special district," a "career center," and inside a passenger terminal of an airport. § 790.06(12)(1)-(15), Fla. Stat. For some of those exclusions, the Legislature included a temporal limitation, such as in subsection (7): "[a]ny *meeting* of the governing body of a county, public school district, municipality, or special district." § 790.06(12)(a)7., Fla. Stat. (emphasis added). Other subsections have a spatial limitation – e.g., subsection (14) is limited to the passenger

terminal and sterile areas of the airport. Some sections, however, have neither temporal nor spatial limitations. For example, subsection (6), excluding firearms at "[a]ny polling place," does not state that firearms are *only* to be prohibited during an election or *only* in parts of the building where voting is actually taking place.

Under well-settled principles of statutory construction, "legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." *State v. Bradford*, 787 So. 2d 811, 819 (Fla. 2001) (*citing Mark Marks, P.A.*, 698 So. 2d at 541); *Beach v. Great W. Bank*, 692 So. 2d 146, 152 (Fla. 1997)). Subsections (7) and (8) demonstrate that the Legislature could have easily imposed a temporal limitation on all locations had it so desired, but that it did not do so. *See Bradford*, 787 So. 2d at 820. Similarly, the legislative decision *not* to limit other subsections to portions of the building or location indicates that the Legislature intended the entire building or location to be subject to the exception.

Because the statute includes temporal and spatial limitations for some locations and not others, basic principles of statutory construction indicate that the Legislature did not intend to impose temporal and spatial limitations where not so provided. The Preemption Law recites that part of its intent is that local jurisdictions "enforce state firearms laws." § 790.33(2)(a), Fla. Stat. This is exactly what Counties seek to do. Therefore, the Counties respectfully request declaratory judgment that they may take reasonable measures to prohibit concealed carry in places listed under section 790.06(12), subject to the limitations (or lack thereof) contained within that section. *See Counties* Compl., Ex. A (Proposed Ordinance, § 18-100(c)).

D. The Counties are Entitled to Regulate Firearm and Ammunition Accessories (Count X).

Section 790.33(1) expressly preempts the "whole field of regulation of firearms and ammunition," but also states the "policy and intent" of prohibiting the enactment of county or

municipal regulations and ordinances relating to "firearms, ammunition, *or components thereof*." §790.33(2)(a), Fla. Stat. (emphasis added). The statute makes no mention of "accessories." [27] Even assuming *arguendo* that "components" are included within the scope of the Preemption Law, the use of "different terms in different portions" of section 790.33 is strong evidence that "components" are not the same as "accessories." *State v. Bradford*, 787 So. 2d at 819. Thus, the statute does not expressly preempt the local regulation of firearm and ammunition "accessories." *See Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010) ("Express preemption requires a specific legislative statement; it cannot be implied or inferred."), *abrogated on other grounds by* § 97.0115, Fla. Stat.

The Counties seek to regulate firearm accessories such as "aftermarket large capacity magazines," which they are not precluded from doing under the plain language of section 790.33. However, because of the severity of the Penalty Provisions, the Counties seek, and are entitled to, a declaration that the Counties' proposed regulatory measures may be enacted consistent with Chapter 790, Florida Statutes.

IX. DEFENDANTS' AFFIRMATIVE DEFENSES ARE LEGALLY INSUFFICIENT.

Most of Defendants' affirmative defenses were substantively raised – and rejected – in connection with the Court's earlier determination of the Motion to Dismiss. *See generally* Order Denying in Part and Granting in Part Defendants' Motion to Dismiss ("Motion to Dismiss Order"), dated October 18, 2018. Because the briefing and argument on the Motion to Dismiss, as well as

[27] Indeed, the only references to "accessories" in the entirety of Chapter 790 are in section 790.222, where a prohibited bump-stock is referred to as an "accessory," and in section 790.33(4)(b) to clarify that local law enforcement agencies may enact and enforce regulations pertaining to firearms, ammunition, "or firearm accessories" utilized by their officers. §§ 790.222, 790.33(4)(b), Fla. Stat.

the preceding sections of this memorandum, dealt substantively with Defendants' affirmative defenses, this section will only briefly respond to each defense.

A. Defendants' First Affirmative Defense Should be Denied: Plaintiffs Have Properly Stated Claims for Relief.

Defendants argue that Plaintiffs have failed to state a claim upon which relief can be granted. As explained in detail in the sections above, Plaintiffs have both alleged and established that the Penalty Provisions unconstitutionally infringe upon their state and federal constitutional rights. Accordingly, Defendants' first affirmative defense is without merit.

B. Defendants' Second Affirmative Defense Should be Denied: There is a Justiciable Case or Controversy.

Defendants allege that this Court lacks subject matter jurisdiction because Plaintiffs have failed to establish the existence of a case or controversy. They argue that Plaintiffs allege only speculative harm based on a "hypothetical state of facts which have not arisen and are only contingent, uncertain, and rest in the future." *Santa Rosa Cty. v. Div. of Admin. Hearings*, 661 So. 2d 1190, 1193 (Fla. 1995) (citation and internal quotation marks omitted). In asserting this defense, Defendants again mistakenly claim, as they did unsuccessfully in their Motion to Dismiss, that establishing a case or controversy requires an "imminent threat of enforcement" – notwithstanding that this Court has already explicitly rejected this standard. Instead, based upon clearly established law, Plaintiffs need only "demonstrate they 'reasonably expect to be affected by the outcome of the proceedings, either directly or indirectly.'" Motion to Dismiss Order at 2 (citing *Pub. Defender, Eleventh Jud. Cir. of Fla.*, 115 So. 3d 261, 282 (Fla. 2013)). Indeed, the purpose of the Declaratory Judgment Act "is to settle and to afford relief from insecurity and uncertainty with respect to rights, status and other equitable or legal relations; and the Act itself is to be 'liberally administered and construed.'" *Hialeah Race Course, Inc. v. Gulfstream Park Racing Ass'n*, 210 So. 2d 750, 752 (Fla. 4th DCA 1968).

Plaintiffs are clearly in need of a declaration of their rights. As the accompanying affidavits and resolutions make abundantly clear, Plaintiffs have refrained from exercising their constitutional rights to take a variety of Proposed Actions due to their well-grounded fear – based on direct threats to them as well as numerous actions in the past – that doing so would subject them to the severe Penalty Provisions. SOF, ¶¶ 9-11.

Defendants' related argument that Plaintiffs fail to allege sufficient legal injury similarly fails. Plaintiffs' complaints and the accompanying affidavits and resolutions vividly illustrate the cognizable injuries that Plaintiffs have suffered and continue to suffer as a result of the Preemption Law's and Penalty Provisions' suffocating effect on their constitutional rights. *See Dep't of Rev v. Kuhlein*, 646 So. 2d 717, 720 (Fla. 1994); *May v. Holley,* 59 So. 2d 636, 639 (Fla 1952).[28] As they have demonstrated concrete harm inflicted by a statute that directly affects them, Plaintiffs possess the requisite interest in determining the validity of the statute and this Court therefore has subject matter jurisdiction to resolve the parties' dispute.

C. Defendants' Third Affirmative Defense Should be Denied: Plaintiffs Have Standing to Bring Their Claims.

Defendants argue that Plaintiffs, as local officials and entities, lack standing to seek a declaratory judgment on the constitutionality of the Penalty Provisions. Defendants' argument rests on a historical rule barring officials from challenging laws that they are responsible for enforcing – a rule that is entirely inapplicable here. *See Crossings at Fleming Island Cmty. Dev.*

---

[28] Where, as here, Plaintiffs have not violated the challenged law and thus do not face an imminent threat of prosecution, they nonetheless have standing because the threat-eliminating behavior was "effectively coerced." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (holding that a pre-enforcement action "plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably affected with a constitutional interest but proscribed by a statute, and there exists a credible threat of prosecution'"); *Wollschlaeger*, 848 F.3d at 1306 (holding that threat of having the law on the books was enough injury to confer standing).

Dist. v. Echeverri, 991 So. 2d 793, 798-800 (Fla. 2008) (explaining the "general rule that public officials may not refuse to administer a statute due to a belief that it is unconstitutional" exists to prevent "the state's business [from coming] to a stand-still").

Plaintiffs seek relief from the Preemption Law because they *want* to perform their duties and faithfully serve their communities, but are prevented from fully doing so due to the unconstitutional Penalty Provisions. SOF, ¶¶ 10-11. Where, as here, local officials allege that a law interferes with their ability to properly discharge their duties, they are not precluded from challenging its constitutionality. *See Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 411 n.4 (Fla. 1996) (holding that school boards had standing to challenge funding scheme that "rendered them unable to adequately discharge their duties" because the prohibition on elected officials bringing a lawsuit does not apply where "a public official is willing to perform his duties, but is prevented from doing so by others") (quoting *Reid v. Kirk*, 257 So. 2d 3, 4 (Fla. 1972)); *Marcus*, 2014 WL 3797314, at *2.

Furthermore, local officials and entities are not barred from seeking relief from a statute that injures their rights. *See Fla. Dep't of Agric. & Consumer Servs. v. Miami-Dade Cty.*, 790 So. 2d 555, 558 (Fla. 3d DCA 2001). As Plaintiffs have demonstrated in Sections I through VIII, the Penalty Provisions violate Plaintiffs' state and federal constitutional rights. Because the Preemption Law and Penalty Provisions directly harm Plaintiffs, they are the proper parties to seek a declaratory judgment as to the law's validity.[29]

---

[29] Additionally, Defendants, other than the Governor, assert in their Third Affirmative Defense that Plaintiff Turkel in the *Weston* case lacks standing because she has not established a special injury different from that experienced by the public at large. In support of that defense, Defendants cite a 101-year old decision, *Rickman v. Whitehurst*, 74 So. 205 (Fla. 1917), which is a case dealing with taxpayer standing to challenge unlawful expenditures, not the infringement of personal constitutional rights. *Id.* at 207. Plaintiff Turkel's affidavit clearly establishes her standing in that she has testified that she has attempted to petition and instruct her local legislators on issues

D. Defendants' Fourth Affirmative Defense Should be Denied: The Defendants are Proper Defendants.

The remaining Defendants in this action – the Governor, the Attorney General, the Commissioner of Agriculture, the Commissioner of the Florida Department of Law Enforcement ("FDLE Commissioner"), and the State of Florida – have each asserted as an affirmative defense that they are not proper defendants because they lack enforcement authority with respect to the penalties imposed by section 790.33. This Court has previously considered and rejected this contention.

This Court correctly explained the applicable test in its Motion to Dismiss Order:

> "The determination of whether a state official is a proper defendant in a declaratory action challenging the constitutionality of a statute is governed by three factors." *Scott v. Francati*, 214 So. 3d 742, 745 (Fla. 1st DCA 2017). "The determination begins with ascertaining whether the named state official is charged with enforcing the statute." *Id*. If, however, "the named official is not the enforcing authority, then courts must consider two additional factors: (1) whether the action involves a broad constitutional duty of the state implicating specific responsibilities of the state official; and (2) whether the state official has an actual, cognizable interest in the challenged action." *Francati,* 214 So. 3d at 746.

Motion to Dismiss Order at 3.

The Court correctly concluded that "[b]ecause the purpose of section 790.33 is to reach any violation of the preemption set forth in section 790.33(1), enforcement of the penalty provisions is implicated whenever any aspect of the State's regulation of firearms is affected by local governmental action." Motion to Dismiss Order at 4. The Attorney General, the FDLE

---

relating to local regulation of firearms, but has been rebuffed by local government representatives who inform her that it is pointless to engage in any discussion of local regulation of firearms or related subjects. SOF, ¶ 5(a). The constitutional rights implicated here are *individual* to Plaintiff Turkel, and not the generalized interests the public at large may have in proper governmental expenditures. *See, e.g., Alachua Cty. v. Scharps*, 855 So. 2d 195, 199-200 (Fla. 1st DCA 2003) (drawing distinction between standing required to challenge unlawful expenditure and standing required to mount a First Amendment challenge).

Commissioner, and the Commissioner of Agriculture each satisfy this portion of the *Francati* test because a violation of various provisions of the statutory scheme would necessarily result in a violation of the broad preemption set forth in section 790.33(1) and trigger the penalty provision in section 790.33(3)(a).[30] *See, e.g.*, §§ 790.06, 790.065(l)(a), 790.251, 790.335, Fla. Stat.; *see also* § 943.03(2), Fla. Stat.

Additionally, the Court correctly concluded that the Attorney General, the FDLE Commissioner, and the Agriculture Commissioner satisfy the second *Francati* test as well. *See* Motion to Dismiss Order at 5–6. As this Court explained:

> The State has created a regulatory scheme to regulate the manner of bearing arms. The scheme addresses (i) the sale and delivery of firearms administered and enforced by the FDLE pursuant to section 790.065(l)(a)); (ii) concealed weapons (administered and enforced by the Agriculture Commissioner, pursuant to section 790.06, and as to background investigations, the FDLE pursuant to section 790.0655(l)(b)); (iii) the registry/listing of gun owners (administered and enforced by the Attorney General pursuant to section 790.335(4)(c)); and (iv) firearms in motor vehicles (administered and enforced by the Attorney General pursuant to section 790.251(6)). Accordingly, the constitutional duty to regulate the manner to bear arms – which lies at the heart of this dispute – implicates duties of the Attorney General, the Agriculture Commissioner, and the FDLE Commissioner.

Id.

Lastly, the Court correctly concluded that in this particular case, due to the nature of the claims at issue, the State of Florida is a proper defendant because it, through representation by the Attorney General, "has a great interest in defending its firearms regulatory scheme." Motion to Dismiss Order at 6; *see Diamond v. Charles*, 476 U.S. 54 (1986).

---

[30] The Court properly rejected Defendants' contention that enforcement of statute rests with private litigants. The Court held that the penalty provisions allowing for fines and removal from office could not be invoked by private litigants under section 790.33(3)(f). Motion to Dismiss Order at 3; *see also UF*, 180 So. 3d at 150–51 (examining language of private cause of action under subsection 790.33(3)(f) and rejecting the argument that "entity" encompasses "persons"); *Thrasher*, 248 So. 3d at 258 (extending holding in *UF* to preclude actions for declaratory and injunctive relief against individual officials).

While this Court did not previously have occasion to examine the Governor's status as a proper defendant because he did not join in the motion to dismiss, application of the first *Francati* test demonstrates that the Governor is also a proper defendant. The Governor is expressly designated as the official to enforce section 790.33(3)(e), Florida Statutes, regarding the removal from office of an official for violation of section 790.33(1), Florida Statutes. *See* § 790.33(3)(e), Fla. Stat.; *see also Marcus v Scott*, No. 37-2012-CA-001260, 2012 WL 5962383 (Fla. 2d Cir. Ct. Oct. 26, 2012) (specifically concluding that Governor Scott is a proper defendant by virtue of the removal provision in section 790.33(3)(e)). No one but the Governor can exercise the removal authority of section 790.33(3)(e).

Additionally, the Governor is expressly designated in the Florida Constitution as the person who can initiate judicial proceedings against any county or municipal officer to enforce compliance with any duty or to restrain any unauthorized act, including any alleged violations of section 790.33(1), Florida Statutes. *See* Art. 4, § 1(b), Fla. Const. ("The governor may initiate judicial proceedings in the name of the state against any executive or administrative state, county or municipal officer to enforce compliance with any duty or restrain any unauthorized act.").

The fact that section 790.33 also happens to create a *limited* private cause of action in favor of individuals who have been "adversely affected" provides no legal basis for concluding that the Legislature could have stripped the Governor of his constitutional enforcement authority to compel compliance with the requirements of section 790.33. This is particularly true when one remembers that the private remedy in subsection (3)(f) is available only against "any county, agency, municipality, district, or other entity," but not any individual official. *See UF*, 180 So. 3d at 150–51; *Thrasher*, 248 So. 3d at 260–61. Enforcement, therefore, devolves to the Governor under Article 4, section 1(b) of the Florida Constitution.

E. Defendants' Fifth Affirmative Defense Against the *Daley* Plaintiffs Should be Denied.

Defendants (other than the Governor) assert that the *Daley* Plaintiffs are not entitled to attorneys' fees as requested in Count X of their amended complaint. While summary judgment on that count is not sought on this motion (and thus the Court need not decide the issue at this time), Defendants' argument in any event fails. The *Daley* Plaintiffs properly seek relief under 42 U.S.C. §§ 1983 and 1988 against Defendant Officials for violating their federal constitutional rights.[31] And if the *Daley* Plaintiffs succeed on those claims, they would be entitled to seek to recover fees under section 1988. *See Lefemine v. Wideman,* 568 U.S. 1, 4 (2012) (stating that succeeding on a claim for declaratory relief will generally entitle one to attorneys' fees under section 1988). Accordingly, this affirmative defense should be rejected.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request the Court grant summary judgment in favor of Plaintiffs and against Defendants on all the grounds asserted in this motion.

[31] As explained throughout this memorandum, the Penalty Provisions unconstitutionally infringe upon Plaintiffs' rights, including those guaranteed by the First and Fourteenth Amendments of the United States Constitution. These federal constitutional violations are cognizable under section 1983. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (affirming a judgment for plaintiff who brought a Section 1983 action challenging city ordinance on First Amendment grounds). Additionally, Defendant Officials are proper "persons acting under color of state law" in a Section 1983 action for declaratory relief. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (explaining that a state official sued in his or her official capacity is a "person" for section 1983 claims seeking injunctive or prospective relief).

DATED: February 21, 2019

Respectfully Submitted,

By: */s/ Jamie A. Cole*
Jamie A. Cole (FBN 767573)
Edward G. Guedes (FBN 768103)
Adam M. Hapner (FBN112006)
Weiss Serota Helfman Cole & Bierman, P.L.
200 East Broward Blvd., Ste. 1900
Fort Lauderdale, FL 33301
(954) 763-4242
jcole@wsh-law.com
eguedes@wsh-law.com
ahapner@wsh-law.com
Counsel for the Weston, Miramar, Pompano Beach, Pinecrest, South Miami, Miami Gardens, Cutler Bay, Lauderhill, Boca Raton, Surfside, Tallahassee, North Miami, Orlando, Fort Lauderdale, Gainesville, St. Petersburg, Maitland, Key Biscayne, Turkel, West Palm Beach, Safety Harbor, and Village of Palmetto Bay Plaintiffs

By: */s/ Michael A. Cardozo*
Michael A. Cardozo (*pro hac vice*)
Chantel L. Febus (*pro hac vice*)
David L. Bayer (*pro hac vice*)
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036-8299
(212) 969-3000
mcardozo@proskauer.com
dbayer@proskauer.com
cfebus@proskauer.com

By: */s/ Matthew Triggs*
Matthew Triggs (FBN 0865745)
Matthew I. Rochman (FBN 84615)
Proskauer Rose LLP
One Boca Place
2255 Glades Road, Suite 421 Atrium
Boca Raton, Florida 33431
(561) 995-4736
Mtriggs@proskauer.com
Mrochman@proskauer.com
Florida.litigation@proskauer.com

By: */s/ Eric A. Tirschwell*
Eric A. Tirschwell (*pro hac vice*)
Everytown Law
450 Lexington Avenue, #4184
New York, New York 10017
(646) 324-8222
etirschwell@everytown.org
Counsel for Plaintiffs Dan Daley, Frank C. Ortis, Rebecca A. Tooley, Gary Resnick, City of Coral Springs, City of Pembroke Pines, City of Coconut Creek, and City of Wilton Manors

By: */s/ Rene D. Harrod*
Rene D. Harrod (FBN 627666)
Nathaniel A. Klitsberg (FBN 307520)
Joseph K. Jarone (FBN 117768)
Claudia Capdesuner (FBN 1002710)
Andrew J. Meyers, Broward County Attorney
115 South Andrews Avenue, Suite 423
Fort Lauderdale, Florida 33301
rharrod@broward.org
nklitsberg@broward.org
jkjarone@broward.org
clcapdesuner@broward.org
(954) 357-7600
Counsel for Plaintiff Broward County, Mayor Mark D. Bogen, Vice Mayor Dale V.C. Holness, Commissioner Nan H. Rich, Commissioner Michael Udine, and Commissioner Beam Furr

By: */s/ Altanese Phenelus*
Altanese Phenelus (FBN 112693)
Shanika A. Graves (FBN 667153)
Angela F. Benjamin (FBN 15914)
Abigail Price-Williams, Miami-Dade County Attorney
Stephen P. Clark Center, Suite 2810
111 NW 1st Street
Miami, Florida 33128
(305) 375-5151
Altanese.Phenelus@miamidade.gov
sgraves@miamidade.gov
Angela.benjamin@miamidade.gov
Counsel for Plaintiffs Miami-Dade County,

Members of the Miami-Dade County Board of County Commissioners, and Mayor of Miami-Dade County

By: */s/ Abigail G. Corbett*
Abigail G. Corbett (FBN 31332)
Veronica L. De Zayas (FBN 91284)
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, FL 33130
(305) 789-3200
acorbett@stearnsweaver.com
vdezayas@stearnsweaver.com
Counsel for the Coral Gables Plaintiffs

By: */s/ LaShawn D. Riggans*
Herbert W.A. Thiele (FBN 261327)
Lashawn Riggans (FBN 29454)
301 South Monroe Street, Suite 202
Tallahassee, Florida 32301
countyattorney@leoncountyfl.gov
riggansl@leoncountyfl.gov
tsonose@leoncountyfl.gov
Telephone: (850) 606-2500
Counsel for Plaintiff Leon County, Florida

By: */s/ Aleksandr Boksner*
Aleksandr Boksner (FBN 26827)
Raul J. Aguila (FBN 524883)
City of Miami Beach
1700 Convention Center Drive, 4th Floor
Miami Beach, Florida 33139
(305) 673-7470
AleksandrBoksnerEservice@miamibeachfl.gov
Counsel for the Miami Beach Plaintiffs

By: */s/ Clifford B. Shepard*
Clifford B. Shepard (FBN 508799)
Shepard, Smith, Kohlmyer & Hand, P.A.
2300 Maitland Center Pkwy. Ste. 100
Maitland, FL 32751
(407) 622-1772
cshepard@shepardfirm.com
Co-Counsel for the City of Maitland

By: */s/ Jacqueline M. Kovilaritch*
Jacqueline M. Kovilaritch (FBN 380570)
Joseph P. Patner (FBN 831557)
Office of the City Attorney for the City of St. Petersburg
P.O. Box 2842
St. Petersburg, FL 33731
(727) 893-7401
eservice@stpete.org
Jacqueline.kovilaritch@stpete.org
Joseph.patner@stpete.org
Co-Counsel for the City of St. Petersburg

By: */s/ Dexter W. Lehtinen*
Dexter W. Lehtinen (FBN 265551)
Claudio Riedi (FBN 984930)
Lehtinen Schultz, PLLC
Village of Palmetto Bay, Florida
1111 Brickell Avenue, Ste. 2200
Miami, FL 33131
Telephone: (305) 760-8544
dwlehtinen@aol.com
criedi@Lehtinen-Schultz.com
asalmon@Lehtinen-Schultz.com
Counsel for Village of Palmetto Bay

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via email through the e-filing portal system on February 21, 2019, to those listed on the attached Service List.

By: s/ *Matthew Triggs*
Matthew Triggs (FBN 0865745)

SERVICE LIST

Edward M. Wenger Chief Deputy Solicitor General Edward.Wenger@myfloridalegal.com Daniel W. Bell Deputy Solicitor General Daniel.Bell@myfloridalegal.com Jenna.Hodges@myfloridalegal.com Jennifer.Bruce@myfloridalegal.com Office of the Attorney General The Capitol, PL-01 Tallahassee, FL 32399 Telephone: 850-414-3683 Facsimile: 850-410-2672 *Counsel for the State of Florida, the Attorney General, the Commissioner of Agriculture, and the FDLE Commissioner*	Daniel E. Nordby General Counsel Office of the Governor daniel.nordby@eog.myflorida.com Meredith L. Sasso Nicholas A. Primrose nicholas.primrose@eog.myflorida.com stephanie.nieset@eog.myflorida.com The Capital 400 S. Monroe Street, Suite 209 Tallahassee, FL 32399 Telephone: 850-717-9310 Facsimile: 850-488-9810 *Counsel for Governor Ron DeSantis*
Jamie A. Cole (FBN 767573) Edward G. Guedes (FBN 768103) Adam M. Hapner (FBN112006) Weiss Serota Helfman Cole & Bierman, P.L. 200 East Broward Blvd., Ste. 1900 Fort Lauderdale, FL 33301 (954) 763-4242 jcole@wsh-law.com eguedes@wsh-law.com ahapner@wsh-law.com *Counsel for the Weston, Miramar, Pompano Beach, Pinecrest, South Miami, Miami Gardens, Cutler Bay, Lauderhill, Boca Raton, Surfside, Tallahassee, North Miami, Orlando, Fort Lauderdale, Gainesville, St. Petersburg, Maitland, Key Biscayne, Turkel, West Palm Beach, Safety Harbor, and Village of Palmetto Bay Plaintiffs*	Rene D. Harrod (FBN 627666) Nathaniel A. Klitsberg (FBN 307520) Joseph K. Jarone (FBN 117768) Claudia Capdesuner (FBN 1002710) Andrew J. Meyers, Broward County Attorney 115 South Andrews Avenue, Suite 423 Fort Lauderdale, Florida 33301 rharrod@broward.org nklitsberg@broward.org jkjarone@broward.org clcapdesuner@broward.org (954) 357-7600 *Counsel for Plaintiff Broward County, Mayor Mark D. Bogen, Vice Mayor Dale V.C. Holness, Commissioner Nan H. Rich, Commissioner Michael Udine, and Commissioner Beam Furr*

<table>
<tr>
<td>Michael A. Cardozo (pro hac vice)
Chantel L. Febus (pro hac vice)
David L. Bayer (pro hac vice)
Proskauer Rose LLP
Eleven Times Square
New York, NY 10036-8299
(212) 969-3000
mcardozo@proskauer.com
dbayer@proskauer.com
cfebus@proskauer.com

Matthew Triggs (FBN 0865745)
Matthew I. Rochman (FBN 84615)
Proskauer Rose LLP
One Boca Place
2255 Glades Road, Suite 421 Atrium
Boca Raton, Florida 33431
(561) 995-4736
Mtriggs@proskauer.com
Mrochman@proskauer.com
Florida.litigation@proskauer.com

Eric A. Tirschwell (pro hac vice)
Everytown Law
450 Lexington Avenue, #4184
New York, New York 10017
(646) 324-8222
etirschwell@everytown.org
Counsel for Plaintiffs Dan Daley, Frank C. Ortis, Rebecca A. Tooley, Gary Resnick, City of Coral Springs, City of Pembroke Pines, City of Coconut Creek, and City of Wilton Manors</td>
<td>Altanese Phenelus (FBN 112693)
Shanika A. Graves (FBN 667153)
Angela F. Benjamin (FBN 15914)
Abigail Price-Williams, Miami-Dade County Attorney
Stephen P. Clark Center, Suite 2810
111 NW 1st Street
Miami, Florida 33128
(305) 375-5151
Altanese.Phenelus@miamidade.gov
sgraves@miamidade.gov
Angela.benjamin@miamidade.gov
Counsel for Plaintiffs Miami-Dade County, Members of the Miami-Dade County Board of County Commissioners, and Mayor of Miami-Dade County

Herbert W.A. Thiele (FBN 261327)
Lashawn Riggans (FBN 29454)
301 South Monroe Street, Suite 202
Tallahassee, Florida 32301
countyattorney@leoncountyfl.gov
riggansl@leoncountyfl.gov
tsonose@leoncountyfl.gov
Telephone: (850) 606-2500
Counsel for Plaintiff Leon County, Florida</td>
</tr>
<tr>
<td>Abigail G. Corbett (FBN 31332)
Veronica L. De Zayas (FBN 91284)
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, FL 33130
(305) 789-3200
acorbett@stearnsweaver.com
vdezayas@stearnsweaver.com
Counsel for the Coral Gables Plaintiffs</td>
<td>Aleksandr Boksner (FBN 26827)
Raul J. Aguila (FBN 524883)
City of Miami Beach
1700 Convention Center Drive, 4th Floor
Miami Beach, Florida 33139
(305) 673-7470
AleksandrBoksnerEservice@miamibeachfl.gov
Counsel for the Miami Beach Plaintiffs</td>
</tr>
</table>