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.

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

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

Plaintiffs,

v.

STATE OF FLORIDA, et al.,

Defendants.

_____ /

Leon County Case No.
2018 CA 001509

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' REPLY IN FURTHER SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by their undersigned counsel, hereby file this reply and memorandum of law in further support of their motion for summary judgment filed February 21, 2019.

PRELIMINARY STATEMENT

This case is ripe for disposition on summary judgment. Defendants concede that "there are no disputed issues of material fact." Def. Resp 4.[1] The detailed facts set forth in Plaintiffs' affidavits and Statement of Facts are undisputed, including that Plaintiffs desire to consider and enact various reasonable measures related to firearms that they believe are not preempted, but have refrained from doing so because the measures could possibly be interpreted as falling under the Preemption Law, and Plaintiffs could therefore be subjected to the severe Penalty Provisions. SOF ¶ 10.

Defendants' response briefs, which Defendant Commissioner of Agriculture joins only with respect to the improper defendant defense (Def. Resp. 3 n.1), do little more than repeat the arguments made in their previously filed submissions and require only a brief reply, which is set forth in the points below. Plaintiffs' motions for summary judgment should be granted and a declaratory judgment entered declaring the Penalty Provisions unconstitutional.

I. THE PENALTY PROVISIONS VIOLATE PLAINTIFFS' LEGISLATIVE IMMUNITY.

In response to Plaintiffs' claim of legislative immunity, Defendants raise nearly the identical arguments made in their Motion for Summary Judgment. Def. Resp. 5–8. Specifically, Defendants argue that: (1) the immunity enjoyed by local officials, unlike state officials, derives "exclusively" from Florida common law; and (2) the Florida Legislature "clearly" abrogated the purportedly inferior level of legislative immunity when it enacted the Penalty Provisions in 2011. *See id.* For the reasons explained in Plaintiffs' Response, Defendants are incorrect. Pl. Resp. 3–

[1] The Governors' and the remaining Defendants' Responses in Opposition to Plaintiffs' Motion for Summary Judgment will be referred to as "Governor's Response" ("Gov. Resp.") and "Defendants' Response" ("Def. Resp."). For consistency Plaintiffs will use the same previously defined terms as in their motion for summary judgment. Plaintiffs' Response in Opposition to Defendants' Motion will be referred to as "Plaintiffs' Response" ("Pl. Resp.").

13. Just like the immunity afforded to state legislators, local legislative immunity derives not only from Florida common law, but also from the separation of powers provision in the Florida Constitution and federal common law. *Id*. As a result, the Florida Legislature cannot abrogate the legislative immunity of local legislators in Florida, and even if it could, it certainly did not do so when it enacted the Penalty Provisions. *Id.*

Interestingly, Defendants appear to concede that Florida's separation of powers provision does apply at the local government level because it prohibits the state judiciary from interfering with certain activities of local governments. Specifically, in an attempt to distinguish some of the cases supporting Plaintiffs' separate claim that the Penalty Provisions violate the discretionary function immunity of local governments (a doctrine that is similarly grounded in the state's constitutional separation of powers provision), Defendants argue that "[t]hose cases concern only the limits of judicial power—specifically, that the courts cannot adjudicate political questions . . . ." *Id.*; Def. Resp. 6–7 n.4. That has been Plaintiffs' contention all along. *See* Pl. Resp. 10–11. For the same reason that the "courts cannot adjudicate political questions" concerning the operation of local government (Def. Resp. 7 n.4), the courts also cannot invade the province of local legislators engaged in local legislative activities. *See League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So. 3d 135, 144–46 (Fla. 2013); *Fla. House of Representatives v. Expedia, Inc.*, 85 So. 3d 517, 524 (Fla. 1st DCA 2012).

If the Court accepted Defendants' broader argument, it would mean that the state judiciary could permissibly interfere with the legislative actions of local legislators, as the Penalty Provisions require, but not the legislative actions of state legislators.[2] Such a novel distinction is

[2] The Penalty Provisions not only require the state judiciary to inquire into the motives of local elected officials who vote in favor of legislation that is subsequently determined to be preempted,

nonsensical and ignores the well-reasoned policy rationales for providing immunity to *all* legislators in America. As the U.S. Supreme Court has explained, "[*r*]*egardless of the level of government*, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability." *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998) (emphasis added). Yet, as long as the Penalty Provisions remain in effect, they will continue to "distort legislative discretion, undermine the public good by interfering with the rights of the people to representation, tax the time and energy of frequently part-time citizen-legislators, and deter service in local government." SOF, Ex. 19 (Final Bill Analysis) at 4 (footnote omitted).

Defendants also argue that absolute legislative immunity does not apply to Plaintiffs "because the challenged penalties apply only to officials engaged in activity outside the sphere of 'legitimate legislative activity'—*i.e.*, local regulation expressly prohibited by state law." Def. Resp. 8 n.5 (citation omitted) (quoting *Bogan*, 523 U.S. at 54). When the Legislature enacted the Penalty Provisions, its staff relied on the same (or substantially similar) faulty reasoning:

> Courts have found that legislators may be subject to personal liability when they lack discretion. Such situations typically exist when legislators are subject to an affirmative duty, such as when a law or court order has directed them to levy a tax. Such acts are labeled "ministerial," as opposed to "legislative," acts. Arguably, an express and clear preemption would remove discretion from local government officials seeking to engage in lawmaking in the preempted field.

SOF, Ex. 19 at 4 (citing *Bogan*, 523 U.S. at 51–52). Notably, this argument directly conflicts with Defendants' current argument that the Legislature "clearly" abrogated legislative immunity when it enacted the Penalty Provisions. Not only did the Legislature fail to do so, it never even tried because it erroneously thought that immunity did not attach to the activities in the first place. *See* Pl. MSJ 11–13.

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but also to impose personal penalties against local elected officials if a "knowing and willful" violation is found. *See* § 790.33(3)(c), Fla. Stat.

In any event, Defendants are fundamentally mistaken as to the scope of Plaintiffs' immunity. "Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Bogan*, 523 U.S. at 54 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)). "Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id.* In *Bogan*, the Court easily concluded that the act of voting is "quintessentially legislative" in nature. *Id.* Therefore, absolute legislative immunity clearly applies to the act of voting in favor of an ordinance that is subsequently determined to be preempted, even if the Preemption Law is knowingly and willfully violated.[3] *See id.*

Moreover, a preemption law's existence does not convert the act of voting into a "ministerial" act or otherwise eliminate discretion as to the promulgation of local ordinances. Under Florida law, "[a] ministerial duty or act is one 'where there is no room for the exercise of discretion, and the performance being required is directed by law.'" *Polley v. Gardner*, 98 So. 3d 648, 649 (Fla. 1st DCA 2012) (quoting *Town of Manalapan v. Rechler*, 674 So. 2d 789, 790 (Fla. 4th DCA 1996)). Unlike a statute or a court order that clearly directs a public official to take a specific action, the Preemption Law does not impose an *affirmative* duty to act in any particular manner and, as demonstrated herein, is far from clear in what it prohibits, *see infra* Part V. Nor could the Preemption Law direct a specific action because enacting legislation is a core governmental function that is *inherently* discretionary and cannot be compelled by the courts. *See Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 919 (Fla. 1985) (stating that

[3] As Plaintiffs have repeatedly professed, they do not seek to intentionally violate the Preemption Law. *See* Pl. Resp. 16–17. Nonetheless, this does not relieve the elected officials of the crippling effect of the Penalty Provisions. *See Bogan*, 523 U.S. at 54–55 ("The privilege of absolute immunity 'would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.'" (quoting *Tenney*, 341 U.S. at 377)).

legislative "actions are inherent in the act of governing"); *Rupp v. Bryant*, 417 So. 2d 658, 663 (Fla. 1982) ("Acts which are discretionary are acts of governing; acts which are ministerial are not."); *State ex rel. Lawler v. Knott*, 176 So. 113, 118 (Fla. 1937) ("Mandamus will never be granted against legislative officers as to legislative or discretionary functions."); *City of Miami Beach v. Lincoln Invs., Inc.*, 214 So. 2d 496, 498 (Fla. 3d DCA 1968) ("Mandamus will not be used to control legislative acts."). Accordingly, regardless of the existence of the Preemption Law, the Penalty Provisions violate the Elected Official Plaintiffs' absolute legislative immunity by penalizing inherently discretionary legislative activity.

II. THE PENALTY PROVISIONS VIOLATE PLAINTIFFS' GOVERNMENTAL FUNCTION IMMUNITY.

In response to Plaintiffs' claim of governmental function immunity, Defendants again argue that the Legislature has the authority to waive sovereign immunity and that it did so when it enacted the Penalty Provisions. However, as explained in Plaintiffs' Response, the Legislature did not (and could not) waive governmental function immunity when it enacted section 790.33(3) because governmental function immunity, unlike other types of sovereign immunity, is protected by the constitutional principle of separation of powers. *See* Pl. Resp. 13–16. For this reason, Defendants have failed to cite *any* authority or example in which the Legislature has legitimately waived governmental function immunity, as opposed to generic sovereign immunity for common law or statutory torts.

Defendants further contend that the Preemption Law does not implicate the underlying concerns of the separation of powers doctrine because it "eliminates local governments' discretion to enact and enforce local firearms regulations." Def. Resp. 10. Again, Defendants misconstrue the true effect of the statute. The Penalty Provisions create liability for historically protected policy-making, planning, and judgmental decisions concerning the enactment of legislation,

regardless of whether the legislation was passed in good faith or upon advice of counsel. *See* § 790.33(3)(b), Fla. Stat. Thus, by their very nature, the Penalty Provisions unlawfully subject core governmental functions to scrutiny by judge or jury as to their wisdom of their performance. *See Trianon Park*, 468 So. 2d at 919.

III. THE REMOVAL PROVISION CONFLICTS WITH ARTICLE IV, SECTION 7, OF THE FLORIDA CONSTITUTION.

With respect to county officers, the Governor remarkably argues that the removal provision does not mean what it says. According to the Governor, the removal provision merely authorizes the Governor to "suspend," rather than "remove," county officials, "thus initiating the process that may ultimately result in the official's removal" by the Senate. Def. Resp. 6. The Governor expressly acknowledges that the removal provision "fails to lay out the multi-step nature of the process in full," but nevertheless claims that it is "fully consistent" with the process articulated in Article IV, Section 7(a) and (b) of the Florida Constitution. *Id.*

As explained in Plaintiffs' response, Pl. Resp. 26–27, the Governor is asking the Court to rewrite the statute, which it obviously cannot do. *See Wyche v. State*, 619 So. 2d 231, 236 (Fla. 1993) ("Courts may not go so far in their narrowing constructions so as to effectively rewrite legislative enactments."). The text of the removal provision is unambiguous and does not warrant a departure from its plain meaning. *See Fla. Soc. of Ophthalmology v. Fla. Optometric Ass'n*, 489 So. 2d 1118, 1119 (Fla. 1986) ("If that language is clear, unambiguous, and addresses the matter in issue, then it must be enforced as written."). Moreover, adopting the Governor's proposed interpretation would only create uncertainty and confusion because it fails to address how *municipal* officials may be removed from office, as there is no corresponding Senate review process articulated in Article IV, Section 7(c). *See* Pl. Resp. 27.

Perhaps recognizing that the removal provision is inconsistent with the Florida Constitution, the remaining Defendants argue that Article IV, Section 7 does not limit the Governor's authority.[4] Def. Resp. 13. Relying on a dissenting opinion in Florida, *Bush v. Holmes*, 919 So. 2d 392, 420 (Fla. 2006) (Bell, J., dissenting), and a 1957 decision from Idaho, Defendants insist that the rule of construction *expressio unius est exclusio alterius*, which means the expression of one thing is the exclusion of the other, "has no application to the provisions of our State Constitution." *Id.* at 14–15 (quoting *Eberle v. Nielson*, 306 P.2d 1083, 1086 (Idaho 1957)). With respect to municipal officials, the Governor likewise argues that the Legislature may expand the Governor's express constitutional authority over elected officials and that it did so when it enacted the Penalty Provisions. Gov. Resp. 8–10.

Defendants' position defies common sense and ignores controlling precedent. As explained in Plaintiffs' Response, the Florida Supreme Court has repeatedly applied the *expressio unius* principle while interpreting the Florida Constitution, and that principle is especially applicable to Article IV, Section 7. Pl. Resp. 17–19. For example, in *Weinberger v. Board of Public Instruction of St. Johns Cty.*, 112 So. 253 (Fla. 1927), the court stated, "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." *Id.* at 256. In *Jackson v. DeSantis*, No. SC19-329, 2019 WL 1614572 (Fla. Apr. 16, 2019), the Florida Supreme Court recently upheld the Governor's *suspension* authority under Article IV, Section 7. In her concurring opinion, Justice Lagoa observed that "Article IV, section 7 of the Constitution provides a *full and complete* method for the suspension and removal of certain categories of officers." *Id.* at *2 (Lagoa, J., concurring)

[4] In *Jackson v. DeSantis*, SC19-329, 2019 WL 1614572 (Fla. Apr. 16, 2019), the Governor argued the exact opposite. *See* Pl. Resp. 20.

(emphasis added); *see also Israel v. DeSantis*, SC19-552, 2019 WL 1771730, at *2 (Fla. Apr. 23, 2019) ("Once the Governor suspends a public official, the Florida Senate has the *exclusive* role of determining whether to remove or reinstate that suspended official.") (emphasis added). Therefore, contrary to Defendants' assertions, the Florida Legislature may not substantially alter that process by statute, as it did by enacting the removal provision. *See* Pl. Resp. 21–23, 25–26.

Finally, Defendants argue that the County Plaintiffs' challenge to the removal provision fails "because Plaintiffs cannot not [sic] show that Section 790.33(3)(e) is unconstitutional in *all* of its applications."[5] Def. Resp. 11 (emphasis added). Defendants state that Article IV, Section 7 applies only to the removal of certain "officers," whereas section 790.33(3)(e) applies to all "person[s]," whether or not they are officers. *Id.* at 11–12. Accordingly, Defendants suggest that the statute is theoretically in harmony with Article IV, Section 7 in at least one limited context.

First, Defendants misconstrue the County Plaintiffs' claim as being solely a facial challenge. *See Counties* Compl. ¶ 18 (alleging that the removal power in section 790.33(3)(e) is unconstitutional both facially and as applied).[6] The County Plaintiffs addressed the unconstitutionality of the removal power as applied in their Motion for Summary Judgment, citing to this Court's previous decision in *Marcus v. Scott*, No. 2012-CA-001260, 2014 WL 3797314 (Fla. 2d Cir. Ct. June 2, 2014). *See* Pl. MSJ 4, 18.

[5] The *Daley* and *Weston* Plaintiffs did not raise a facial challenge to the removal provision; their challenge is "as applied" to the Elected Official Plaintiffs. *See Weston* Compl. ¶ 49 ("As such, the Court should declare that section 790.33(3)(e), as applied to the Elected Official Plaintiffs, is invalid and unconstitutional."); *Daley* Compl. ¶ 29 (requesting a declaration "that Plaintiff Elected Officials' rights under Article IV, Section 7(c) of the Florida Constitution not to be removed from office except for indictment or conviction of a crime is violated by the removal power given to the Governor under the Penalty Provisions").

[6] The County Plaintiffs challenge the removal provision both on its face and as applied, and also challenge the remainder of section 790.33(3)(e) as an unconstitutional impairment of contracts. *See Counties* Compl., Count II.

Additionally, Defendants misconstrue the County Plaintiffs' challenge as applying to both "cause for termination of employment or contract" *and* "removal from office by the Governor." That is incorrect. The County Plaintiffs challenge only the Governor's removal power, not the declaration of "cause for termination of employment or contract." The County Plaintiffs seek a declaration that the statutory penalty of "removal from office by the Governor" is facially unconstitutional *in all circumstances* as to county elected officials. *See Counties* Compl. ¶¶ 60, 63.

The entirety of section 790.33(3)(e) provides:

> 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*. (Emphasis added).

While this section generally relates to "all persons acting in an official capacity" (both employees and officers), the gubernatorial removal provision clearly applies only to *officers* (as opposed to employees), as demonstrated by the Governor's statutory authority to remove such individuals "*from office*" (as compared to terminating employees' employment contracts). There is no set of circumstances under which it would be constitutional for the Governor to "remov[e] from office" a county officer, as Article IV, Section 7 of the Florida Constitution expressly authorizes the Governor only to "suspend" "any county officer." Moreover, the term "by the Governor" necessarily modifies "removal from office," not "termination of employment or contract." Therefore, Defendants' technical argument must be rejected, and the removal provision stricken.

IV. DEFENDANTS' ARGUMENT THAT THE PENALTY PROVISIONS DO NOT UNCONSTITUTIONALLY BURDEN PLAINTIFFS' RIGHTS TO FREE SPEECH, ASSOCIATION, PETITION, AND INSTRUCTION DOES NOT WITHSTAND ANALYSIS.

Defendants do not answer Plaintiffs' free speech, association, petition, and instruction arguments. Plaintiffs' essential contention is that the Penalty Provisions impose an impermissible and unconstitutional burden on these fundamental rights of Florida constituents and their elected officials by imposing penalties so severe that Plaintiff Elected Officials are functionally precluded from enacting regulations that they legitimately believe are not preempted, which in turn has adverse effects on Plaintiffs' speech and association rights. *See* Pl. MSJ 21–31; Pl. Resp. 16, 27–32. None of the three arguments Defendants make in their response actually address these speech, association, petition, and instruction violations. *See* Def. Resp. 16–19.

A. The Penalty Provisions Violate the First Amendment and Florida Constitution Because They Cause Elected Officials and Constituents Not to Urge Passage of Certain Provisions.

Defendants' primary argument is that the Penalty Provisions do not violate the First Amendment because they only prohibit voting on and enacting preempted regulations. In support of this proposition, Defendants rely on an out-of-context quote from *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2011), to argue that one cannot use "governmental mechanics to convey a message." Def. Resp. 16 (citing *Carrigan*, 564 U.S. at 127). That argument misses the point. Taken in context, the *Carrigan* Court was simply stating that voting (*i.e.*, governmental mechanics) is not speech. *See id.* at 127. Plaintiffs' argument does not depend on whether the votes of elected officials constitute speech. *See* Pl. MSJ 24. Rather, as Plaintiffs have argued, the Penalty Provisions impermissibly chill protected speech rights because elected officials are unwilling to bring to the floor ordinances that they legitimately believe are not preempted due to fear of litigation and accompanying penalties. *See, e.g.*, Pl. MSJ 23, 25–26, 29-31; Pl. Resp. 30–31. Not

only does *Carrigan* not foreclose this argument—the Court's opinion was clear that its opinion did not address that argument, *see* 564 U.S. at 128—but one Justice emphatically stressed that a statute like the Penalty Provisions "may well impose substantial burdens" on speech and association. *Id.* at 129 (Kennedy, J., concurring). Those "substantial burdens" on speech and association are presented here, and Defendants have provided no response as to why those burdens are not unconstitutional.

The issue, moreover, is not academic. Plaintiffs have already seen the "substantial burdens" imposed by the Penalty Provisions on their speech and association rights in numerous ways. *Id.* For example, four Plaintiff Elected Officials from four different municipalities have attested that, because of the threat posed by the Penalty Provisions, they have been deprived of the opportunity to speak and associate in favor of regulations that they believe are not preempted, *see, e.g.*, SOF ¶¶ 13, 13(b), 14, 14(a), 14(b), and their constituents have been deprived of the right to speak, lobby, petition, and associate on such regulations and others like them. *See, e.g.*, *id.* ¶¶ 5(a), 5(b), 5(c), 13, 13(a). Plaintiff Turkel has not even been able to get her legislators to consider her proposed solutions to her firearm safety concerns as a result of the Penalty Provisions. *See id.* ¶ 5(a).

There can be no doubt that these impositions violate Plaintiffs' fundamental rights. *See, e.g., Meyer v. Grant*, 486 U.S. 414, 422 n.5 (1988) (overturning statute that burdened conduct "involv[ing] a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment"); *Laird v. Tatum*, 408 U.S. 1, 12–13 (1972) ("recogniz[ing] that governmental action may be subject to constitutional challenge even though it has only an indirect effect on the

exercise of First Amendment rights" where plaintiffs have demonstrated injury or appropriate danger of the same). Simply put, *Carrigan* is inapposite to the case at hand.

B. The First Amendment and Florida Constitution Protect Political Speech Incident to Political Campaigns.

After their (misplaced) reliance on *Carrigan*, Defendants seem to argue that there can be no speech violations for any other chilling of speech that results from the Penalty Provisions because the First Amendment and Florida Constitution do not guarantee the success of any given speech act. *See* Def. Resp. 17–19. But the Tenth Circuit case on which Defendants rely, *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006), actually supports Plaintiffs' argument. *Walker* explains that, while the First Amendment "does not protect the right to make law [e.g. vote on an ordinance]," it certainly *does* "protect[] political speech incident to an initiative campaign," such as the speech chilled here. *Id.* at 1099. *Walker* further explains that courts distinguish between "laws that regulate or restrict the communicative conduct of persons advocating a position in a referendum, which warrant strict scrutiny, and laws that determine the process by which legislation is enacted, which do not." *Id*. at 1100. *Walker* dealt with the latter situation, while Plaintiffs raise the former. The chilled speech at issue here—the speech of elected officials and their constituents—is communicative conduct, not merely procedural, and therefore warrants strict scrutiny.

Moreover, contrary to Defendants' assertions, Plaintiffs have never argued that they are entitled to succeed in passing a given ordinance. Rather, Plaintiffs have demonstrated through their uncontradicted affidavits that they have been chilled from taking even the most basic actions in support of their positions as a result of the Penalty Provisions. *See, e.g.*, SOF ¶¶ 9–12. As explained in Plaintiffs' summary judgment brief, that chilling of speech and association rights does not survive strict scrutiny. *See* Pl. MSJ 24–28.

Defendants' reliance on *MacMann v. Matthes*, 843 F.3d 770 (8th Cir. 2016), is similarly inapposite. Def. Resp. 18. *MacMann* discussed an Eighth Circuit case that analyzed the validity of a procedural restriction on when the number of signatures on a petition could be calculated and certified. *See* 843 F.3d at 778 (discussing *Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997)). The Eighth Circuit found that the restriction did not impose a First Amendment violation because the regulation at issue, much like the one in *Walker*, "did not interfere with the message communicated by proponents in the initiative petition, did not restrict proponents' ability to circulate the petition, did not affect proponents' ability to communicate with other voters, and did not regulate the content of proponents' speech." *Id.*; *see also Dobrovolny*, 126 F.3d at 1113 ("While the Nebraska provision may have made it difficult for appellants to plan their initiative campaign and efficiently allocate their resources, the difficulty of the process alone is insufficient to implicate the First Amendment, *as long as the communication of ideas associated with the circulation of petitions is not affected*.") (emphasis added).

In direct contrast to *Walker*, *MacMann*, and *Dobrovolny*, the Penalty Provisions *do* restrict the messages of Plaintiff Elected Officials and their constituents, regulate the content of their speech, and impede their ability to communicate in their chosen manner.[7] *See* SOF ¶¶ 5, 9-14. The restrictions imposed by the Penalty Provisions are precisely the kind of "restriction" of "political discourse" that *MacMann* explains will cause *Meyer* to control. *See* 843 F.3d at 778.

[7] Defendants' other citations (Def. Resp. 17) do nothing to address or undermine this distinction. *See Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (invalidating a law compelling medical clinics to post information about State-provided reproductive services because it was not a regulation of professional conduct, and thus did not fall within permissible regulations of professional conduct that incidentally burdened speech); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (invalidating a law restricting the sale, disclosure, and use of pharmacy records as an unconstitutional burden on speech because both facially and "[i]n its practical operation" it "impose[d] a burden based on the content of speech and the identity of the speaker.").

Defendants also incorrectly cite *Top Rank, Inc. v. Florida State Boxing Commission*, 837 So. 2d 496 (Fla. 1st DCA 2003), a case where the First District Court of Appeal upheld a five percent tax on boxing promoters' total gross receipts from boxing matches and explicitly explained that the First Amendment was not implicated because "[t]he activity that [was] being taxed [was] the *promotion* of the boxing match and not the provisions of commentary and interviews." 837 So. 2d at 502 (emphasis added); Def. Resp. 17. Notably, the court stated that if it had been considering "either pure speech or symbolic speech," rather than the promotion of "a purely entertainment pastime," they would "be required to reject the Boxing Commission's argument that merely because a person or entity may be several steps removed from the actual dissemination of speech, they are not entitled to First Amendment protections." *Id.* at 501. In other words, even if a statute has an indirect adverse effect on speech and association rights, it implicates constitutional concerns. *See Sorrell*, 564 U.S. at 566 (even if a law "on its face appeared neutral as to content and speaker, its purpose to suppress speech and its unjustified burdens on expression would render it unconstitutional").

C. The Ability to Seek Legislative Change at the State Level Does Not Render the Penalty Provisions Constitutional.

Finally, Defendants argue that the Penalty Provisions' gross violations of Plaintiffs' speech, association, petition, and instruction rights are acceptable because Plaintiffs can still address their concerns by seeking change at the State level. *See* Def. Resp. 19. Defendants' suggestion avoids Plaintiffs' actual arguments and fails to respond to the legal requirement that Plaintiffs be able "not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 U.S. at 424 (that plaintiffs "remain free to employ other means to disseminate their ideas" does not remove their preferred form of speech from "First Amendment protection"). Citizens like Plaintiff Turkel believe that their concerns are best dealt

with at the local level (where they have greatest access to their representatives) and would petition their local officials accordingly, but are deterred by the potential effect of the Penalty Provisions on their representatives and their representatives' functional inability to act. *See, e.g.*, SOF ¶¶ 5(a), 5(b), 5(c). Plaintiff Elected Officials wish to pass arguably non-preempted ordinances (as permitted under the Preemption Law) and their constituents wish to petition them to pass similarly arguably non-preempted local laws and to speak and associate toward that end. *See, e.g.*, *id.* ¶¶ 9–13. Plaintiffs are entitled under the First Amendment and Florida Constitution to do so, but they are legitimately afraid to take such action out of fear the ordinance may be found preempted and they will be subject to the Penalty Provisions. That constituents *could* lobby local officials who *could* lobby the State legislature to pass *different* laws at the State level is irrelevant to Plaintiffs' free speech, association, petition, and instruction claims.

The cases relied upon by Defendants are not to the contrary. *See* Def. Resp. 19. Defendants' cases concern plaintiffs who *were* able to exercise their rights, and those decisions merely stress that plaintiffs are not entitled to their desired outcomes.[8] Here, Plaintiffs allege that the Penalty Provisions have rendered them practically unable to exercise their rights. Nothing in Defendants' response explains why Defendants should be permitted to make Plaintiffs' constitutional rights illusory.

[8] *See Wilson v. City of Columbia*, No. 2:14-CV-04220-NKL, 2014 WL 4388291, at *1 (W.D. Mo. Sept. 5, 2014) (finding citizens' First Amendment rights not violated where they petitioned but were ultimately unsuccessful in blocking the development of a housing project); *Tunget v. Smith*, No. 08 Civ. 3089, 2010 WL 1241831, at *7 (C.D. Ill. Mar. 19, 2010) (finding a co-defendant entitled to summary judgment where he had not acted to injure plaintiff, despite plaintiff having repeatedly complained to him about the harm, and quoting *Brewer v. Ray*, No. 04-C-957-S, 2005 WL 1532599, *2 (W.D. Wis. June 29, 2005), *aff'd*, 181 F. Appx. 563 (7th Cir. Wis. 2006) ("Plaintiff argues that his First Amendment right to petition the government was violated by defendant Ray's handling of his inmate grievances. He was, however, allowed to file numerous inmate complaints as well as civil actions in this court. The First Amendment allows him to petition the government for redress but does not guarantee a certain result.")).

As the Penalty Provisions amount to a gross violation of Plaintiffs' rights to speech, petition, association, and instruction, they should be declared invalid.

V. THE PREEMPTION LAW AND PENALTY PROVISIONS ARE UNCONSTITUTIONALLY VAGUE.

A. Defendants Continue to Misstate the Correct Legal Standards.

Defendants' primary response is that the Preemption Law and Penalty Provisions are not vague in all their applications. Def. Resp. 19-21. Defendants mistakenly assert that Plaintiffs "must shoulder the 'heavy burden' of establishing that . . . there exists no set of circumstances in which a statute can be constitutionally applied,'" citing *State v. Barnes,* 686 So. 2d 633, 637 (Fla. 2d DCA 1996 (citing *United States v. Salerno,* 481 U.S. 739, 745 (1987)). Def. Resp. 20. As discussed in Plaintiffs' Response (Pl. Resp. 34), this argument fails because it relies upon cases that predate the Supreme Court's pronouncement in *Johnson v. United States*, which rejected the standard upon which Defendants rely. 135 S. Ct. 2551, 2560–61 (2015) (clarifying that simply because some conduct "clearly falls within [a vague provision's] grasp" is insufficient for a law to survive a vagueness challenge). Defendants also ignore the well-established law that a statute that contains punitive measures—such as the large fines, removal from office, damages, and attorneys' fees in the Penalty Provisions—it is deemed penal, and any doubt as to its meaning must be resolved against the State. Pl. MSJ 34; Pl. Resp. 33.

Defendants concede that a scienter requirement will not save a law from a vagueness challenge when the law does not give fair warning as to what is prohibited. Def. Resp. 24. Defendants attempt to limit this admission, however, by contending that a scienter requirement is unavailing only if *both*: (1) the statute fails to forbid a clear and definite act *and* (2) the statute relies upon scienter to define the prohibited conduct. *Id.* at 24 (citing *State v. Mark Marks, P.A.*, 698 So. 2d 533, 539 (Fla. 1997)). Defendants misread the Florida Supreme Court's decision in

Mark Marks. In that case, the Court stated that "a scienter requirement may save a statute from the objection that it punishes without warning an offense of which the accused was unaware. It will save a statute from this objection, however, only where the statute forbids a clear and definite act." *Id.* at 538 (citing *Screws v. United States*, 325 U.S. 91, 102 (1945)). The Court went on to clearly hold that "the constitution requires a definiteness defined by the legislature rather than argumentatively spelled out by the courts," and "the act a statute proscribes must be at least clear enough to avoid arbitrary enforcement." *Mark Marks*, 698 So. 2d at 539. In connection with the Preemption Law, the proscribed conduct is so vague that Plaintiffs cannot determine what is prohibited, so the existence of a scienter requirement does not make "definite that which is undefined." *Screws*, 325 U.S. at 105.

There is no factual dispute that Plaintiffs do not know what conduct is proscribed by the vague Preemption Law. *See* SOF ¶¶ 9-12. Plaintiffs are not alone in their confusion: even the former Attorney General of the State of Florida was at a loss to know what action was precluded by this vague law and advised the City of South Miami that a local ordinance was perfectly permissible, only later to have his opinion rejected and that very ordinance declared preempted by the appellate court. *Compare Honorable John Grant*, Fla. AGO 2000-42, 2000 WL 972870 (July 11, 2000), *with Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So. 2d 504 (Fla. 3d DCA 2002); *see* Pl. Resp. 36. The Preemption Law was so vague that even in a "mine run case" (Def. Resp. 20), the chief legal counsel for the State of Florida could not determine what was prohibited.

B. Defendants' Arbitrary Conclusions as to What Actions Are Permissible and Impermissible Under the Preemption Law Highlight Its Vagueness.

Plaintiffs have provided the Court with a variety of actions Plaintiffs wish to take but have refrained from doing because of the vagueness of the Preemption Law and the Penalty Provisions'

severity. *See* SOF ¶¶ 10, 12. Defendants argue that the law is clear and offer their theories of permissible and impermissible actions.

First, Defendants assert that the Preemption Law prohibits regulation of "components" and "accessories" of firearms despite those terms not being used in section 790.33(1). *See* Def. Resp. 24-25. Here, Defendants rely on nothing but a bald assertion that regulation of firearm components and accessories has the "purpose and effect of regulating the use and possession of firearms." Def. Resp. 25. Plaintiffs have fully briefed this issue and have shown that the Defendants' argument is unavailing. Pl. Resp. 38-40.

Similarly, Defendants claim that measures, directives, enactments, orders, and policies related to firearms are all forms of firearm "regulation" and are, therefore, preempted as well. Again, Plaintiffs have fully responded to Defendants' argument and have shown it to be flawed. Pl. Resp. 37-38. Moreover, it is worth noting that Defendants have conceded that actions taken in a proprietary capacity are not preempted. Def. Resp. 22, 38. Although Defendants argue that measures, directives, etc., relating to firearms are all forms of firearm "regulation," Defendants concede that local governments can act in their proprietary capacity through the adoption of measures, directives, etc. that direct the local government's staff to act. Def. Resp. 22, 38. Thus, Defendants' concession that Plaintiffs can act as proprietors leaves Plaintiffs in the indeterminate position of not knowing whether they can *order* or *direct* their respective administrators and managers to act in a proprietary capacity without violating the Preemption Law.

Defendants also repeatedly cite *Florida Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452 (Fla. 1st DCA 2017), to claim that the Preemption Law is clear as to what it prohibits. In that case, the First District concluded it was clear the Legislature intended to prohibit only *enactment of ordinances regulating firearms* and not merely their republication. *Id.* at 458-59. The court did not

address the question of whether affirmative actions that fall short of *regulation* (such as enactment of a policy or an order to a county or municipal administrator or manager) are prohibited. *See* Pl. MSJ 37. Here, where the text of the statute not only provides no guidance but also affirmatively confuses the issue, this Court should find the Preemption Law and Penalty Provisions are unconstitutionally vague.

Finally, Defendants contend that Plaintiffs merely seek a "round-about" way of regulating firearms. Def. Resp. 27. Not so. Plaintiffs seek to use permissible regulatory and non-regulatory authority, but are at a loss as to which actions are within the scope of their permissible regulatory authority and whether actions *falling short of the regulation of firearms* are permitted under the vague Preemption Law. Pl. MSJ 36-38, 40 (discussing, among other things, banning large capacity magazines, taking actions in a proprietary capacity, and requiring reporting of failed background checks). As a result, Plaintiffs are unable to take *any* substantive action that is arguably related (no matter how remotely) to the field of firearms and ammunition.

C. Defendants Fail to Address Plaintiffs' Argument that the Preemption Law Is Vague as to Whom It Applies.[9]

Defendants contend the Preemption Law is not vague as to whom it applies, focusing only on a single illustrative example from Plaintiffs' Motion—the potential liability of a commissioner who votes *against* an obviously preempted law. Defendants argue that any such violation would

[9] Defendants assert Plaintiffs did not allege that the Preemption Law is vague as to whom it applies. This is not accurate: Plaintiffs alleged that the Preemption Law is vague in the entirety of its application. *See, e.g.*, *Daley* Compl. ¶¶ 5, 118; *Counties* Compl. ¶¶ 6-8; *Weston* Compl. ¶¶ 37-39. Plaintiffs have clearly raised the issue of statutory vagueness in their complaint. *See Weston Compl.* Count V; *Daley* Compl. Count VI; *Counties* Compl. Count V. Therefore, the issue is properly before the court. *See Kuehne & Nagel, Inc. v. Lewis Marine Supply, Inc.*, 365 So. 2d 204, 205 (Fla. 3d DCA 1978) (stating that summary judgment may not be granted where a *cause of action* is not pled in a complaint, as opposed to a specific argument). Defendants appear to be arguing that Plaintiffs must raise every conceivable *legal argument* in their respective complaints, but no such requirement exists.

not be "knowing and willful." This argument not only ignores that a private action is not limited to "knowing and willful" violations (Pl. Resp. 34), but also simply retreads Defendants' flawed assertion that the scienter requirement saves the unconstitutionally vague Preemption Law, which need not be rebutted again here. *See infra* Part V; Pl. MSJ 39-40; Pl. Resp. 34-35.

Defendants neglect to address Plaintiffs' argument that the Preemption Law is not even clear as to whether voting on a preempted ordinance violates the Preemption Law. *See* Pl. MSJ 38-39. The Penalty Provisions provide that a "person" can "violate[]" the Preemption Law by "enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon such exclusive occupation." An individual commissioner cannot individually enact or cause anything to be enforced. *See id*. Thus, Plaintiffs cannot determine whether the Penalty Provisions apply to the elected officials at all and, if they do, what they prohibit an individual commissioner from doing.

Fundamentally, Defendants read whatever is expedient into the Preemption Law's vague terms to arbitrarily decide what conduct they view to be permissible and impermissible. Defendants' attempts to bolster and clarify the Preemption Law only highlight its fatally vague nature and the need to prevent its "arbitrary and discriminatory" enforcement. *See Mason v. Fla. Bar*, 208 F.3d 952, 959 (11th. Cir. 2000). Accordingly, the Court should grant summary judgment in favor of Plaintiffs and declare the law unconstitutionally vague.

VI. THE PENALTY PROVISIONS UNCONSTITUTIONALLY IMPAIR THE COUNTIES' CONTRACTS.

Defendants' Response attempts to sidestep the material detrimental impact that the Penalty Provisions have on the contract between Broward County and its County Administrator (the "Broward Contract") and Leon County and its County Administrator (the "Leon Contract"). Defendants' argument that the claim is unripe or that any impairment is "*de minimis*" (Def. Resp.

31-32, 35) is fully addressed and briefed in Plaintiffs' Response. As a matter of law, Plaintiffs are entitled to a declaration of their rights on the issue of whether the Penalty Provisions unconstitutionally impair the Broward Contract because the claims withstood the Defendants' motions to dismiss.[10] *See* Pl. MSJ 7; Pl. Resp. 41-42. Under Florida law, "virtually no degree of contract impairment is tolerable" and neither Broward County nor Leon County bargained for limitations on their right to direct their County Administrators. *See Sears, Roebuck & Co. v. Forbes/Cohen Fla. Props, L.P.*, 223 So. 3d 292, 299 (Fla. 4th DCA 2017); *see also* Pl. Resp. 45.

Defendants' additional arguments boil down to asserting that either the Penalty Provisions do not impair the applicable contracts or that, if there is an impairment, it is constitutional. First, Defendants assert that because the Broward Contract is freely terminable without cause by either of the parties, there is no "enforceable right" that can be impaired. Def. Resp. 32. Essentially, under Defendants' worldview, the Legislature may trample over freely terminable contracts as it sees fit. Defendants fail to cite any relevant support for this proposition, which is contrary to the entire body of contract law; the sole case cited by Defendants (*id.*) (which relates to a county government's ability to thwart a bond holder's right to compel payment) has no bearing on the instant matter. *See State ex rel. Simmons v. Harris*, 161 So. 374, 379 (Fla. 1935). The Legislature's grant of gubernatorial authority to terminate the County Administrators' contracts lessens the value

[10] All of Broward County's arguments are equally applicable to Leon County and the Leon Contract. Defendants contend that Leon County's claims cannot be heard because they were allegedly asserted for the first time in Plaintiffs' Motion for Summary Judgment. *See* Def. Resp. 35-36. However, Defendants concede that if the Court were to hear Leon County's claim, summary judgment should be denied for "the same reasons" as argued against Broward County's claim. *Id.* at 36. Defendants thus necessarily concede that Leon County's claim does not raise any new issues and the substantive arguments for both Broward County and Leon County are identical. Therefore, there is no "material change" in the claims asserted against the Defendants, and the claim was properly added in compliance with the Court's August 9, 2018 Amended Case Management Order.

or strength of the contracts and meets the definition of unconstitutional "impairment." *See* Pl. MSJ 42-43; Pl. Resp. 42-43.

Defendants next argue that the Counties improperly seek to limit the Governor's power by contract. Def. Resp. 32. Defendants misconstrue the claim. The Counties are not alleging they have the ability to limit the Governor's power via contract, but rather that the Legislature overstepped its constitutional authority by rewriting the Broward Contract and the Leon Contract in violation of Florida and United States Constitutions. Pl. MSJ 42-43, Pl. Resp. 42-43. Defendants' cited case law is inapplicable. *See Beta Eta House Corp. v. Gregory*, 230 So. 2d 495, 498 (Fla. 1st DCA 1970) (relating to third party beneficiary issues involving liability insurers); *Breslow v. Baltuch*, 508 So. 2d 498, 499 (Fla. 3d DCA 1987) (family law case involving a contract setting child support payments in which the court held that parents cannot contract away a child's right to adequate child support).

Defendants' remaining arguments also lack merit. Defendants wrench the phrase "may be precluded by law" from its contractual context to argue that the Broward Contract contemplates that indemnification may be precluded by section 790.33. Def. Resp. 33. The Broward Contract actually reads that even though the County "may proceed to handle a claim, action, or demand" against the County Administrator, the County may later determine that claim (i.e., the claim against the Administrator) is precluded or not covered, in which case the County may "at a later date" deny a defense or recover its costs. This is not an "absolution" of the contractual obligation to indemnify, as Defendants argue. Moreover, Defendants' case law neither supports their argument nor apply to these facts. *See* Pl. Resp. 44, n.25. The only new authority is even more inapposite. *See Fla. Dep't of Health & Rehab. Servs. v. Southern Energy, Ltd.*, 493 So. 2d 1082 (1st DCA 1986) (contracting party sued state agency on contract with that state agency claiming breach and

impairment by failure to appropriate funds). Additionally, Defendants' argument that Broward County is not required to pay severance also fails: the Penalty Provisions authorize a non-party to the contract to determine what constitutes a termination "for cause" in violation of the prohibition against impairment of contracts in the Contracts Clause. *See id*. at 43-44. And finally, Defendants contend that to the impairment serves an "important public purpose," namely uniform statewide firearm regulations. As more fully argued in Plaintiffs' Motion and Plaintiffs' Response, the Penalty Provisions are wholly unnecessary to achieve the stated purpose. *See* Pl. MSJ 23-28; Pl. Resp. 45.

Plaintiffs have established that the Penalty Provisions unconstitutionally impair the Broward Contract and Leon Contract because the Penalty Provisions materially and adversely impact the rights of the parties, and are entitled to a declaration of unconstitutionality as applied to these contracts.

VII. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT AS TO THE PERMISSIBLE REGULATIONS (*COUNTIES* COMPL. COUNTS VII–X; *WESTON* COMPL. COUNT VI).

A. Counties Are Entitled to Enact Regulations to Enforce Local Option Requirements (*Counties* Compl., Count VII).

Defendants concede that the Preemption Law–which, according to Defendants, "eliminates local governments' discretion to enact and enforce local firearms regulations" (Def. Resp. 10)–conflicts with the Local Option powers of counties set forth in Article VIII, Section 5(b) (Def. Resp. 36). Defendants thus concede that Counties have the constitutional authority to enact *regulations* to enforce the Local Option notwithstanding the Preemption Law.

However, Defendants then place *themselves* as the arbiters of the counties' constitutional discretionary authority and purport to dictate *how* counties exercise their Local Option authority, seeking to limit such exercise to only that which *Defendants* believe is "sufficient" and precluding

those actions that *Defendants* believe are "not necessary." Def. Resp. 37. There are no supporting citations for Defendants' contentions, because there is no legal authority for their position. Judgment should therefore be granted in favor of the County Plaintiffs on Count VII.

B. Plaintiffs Are Entitled to Exercise Proprietary Authority (*Counties* Compl., Count VIII; *Weston* Compl., Count VI).

Defendants concede that Plaintiffs may take actions relating to firearms and ammunition in their proprietary capacity (Def. Resp. 38) and therefore judgment should be granted to Plaintiffs on Count VIII of the *Counties* Complaint and Count VI of the *Weston* Complaint. However, Defendants walk back their concession and contend Plaintiffs may not exercise such proprietary action via ordinance. *Id.* As Defendants conceded just one page earlier, ordinances relating to firearms and ammunitions are not necessarily regulatory and are thus not all precluded by section 790.33. *See id.* at 37, n.14. Therefore, Defendants effectively concede this claim, and judgment should be granted to Plaintiffs and the Court should declare that all actions taken in a proprietary capacity—whether by ordinance, resolution, rule, or otherwise—are not precluded.

C. Counties Are Entitled to Prohibit Carrying of Firearms into Statutorily-Specified Locations (*Counties* Compl., Count IX).

Defendants also concede that Plaintiffs are entitled to a declaration that they may enforce section 790.06(12)(a). Def. Resp. 39. Yet in the next breath, Defendants contend that while Plaintiffs are required to enforce the firearms laws, they may not enact regulations to enforce them. *Id*. This is logically incoherent. Local governments can only enforce the firearms laws through regulations and ordinances. Moreover, Defendants have already conceded that some regulations "do not 'regulate' firearms or ammunition" and therefore are permissible. *See id.* at 37, n.14. By that same logic, the Counties may enact regulations or take other actions to designate certain facilities as "polling place[s]," "career center[s]," an educational administration building, or a

"place of nuisance"—regulations that do not regulate firearms or ammunition—without violating the Preemption Law, and Counties are entitled to such a declaration.

D. Counties Are Entitled to Regulate Accessories (*Counties* Compl., Count X).

Defendants' only response on Count X of the *Counties* Complaint is to conflate—without citation and contrary to basic principles of statutory interpretation—the terms "accessories" and "firearms and ammunition." Def. Resp. 40. This is already fully rebutted in the Plaintiffs' summary judgment motion. *See* Pl. MSJ 49-50.

VIII. DEFENDANTS' REMAINING ARGUMENTS ARE NOT MERITORIOUS.

The Governor's arguments with respect to subject matter jurisdiction and standing simply repeat the arguments he previously made. Gov. Resp. 2-5. The remaining Defendants' arguments on those points, together with their assertion that Defendants are improper parties, are not even argued, with the Defendants simply noting (Def. Resp. 4 n.2) that they are set forth "for preservation purposes."

Defendants also incorrectly argue that because Plaintiffs did not move for summary judgment on some of their claims—substantive due process, equal protection and usurping the role of the judiciary—"the court should resolve those claims in favor of defendants." Def. Resp. 5. There is no requirement that a party *must* move for summary judgment on all claims raised in its complaint. Nor is there any basis to conclude those claims are "abandoned." In fact, they are specifically defended in Plaintiffs' Response. *See* Pl. Resp. 45-51. Therefore, the Court may enter summary judgment in favor of Plaintiffs on all of their claims. *See Se. Bank, N.A. v. Sapp*, 554 So. 2d 1193, 1196 (Fla. 1st DCA 1989) ("Provided the law and facts support such a ruling, a trial court may properly enter summary judgment in favor of the party opposing the motion, even in the absence of a cross-motion for summary judgment.").

CONCLUSION

For the reasons set forth above and in Plaintiffs' affirmative and response briefs, Plaintiffs' motions for summary judgment should be granted and a declaratory judgment entered declaring the Penalty Provisions unconstitutional.

Dated: May 8, 2019

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served to all counsel of record via email through the e-filing portal system on May 8, 2019.

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