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

CITY OF WESTON, FLORIDA, et al.,

Plaintiffs,

v.

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

Defendants.

_____ /

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

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

Plaintiffs,

v.

STATE OF FLORIDA, et al.,

Defendants.

_____ /

Leon County Case No.
2018 CA 001509
(Applicable to All Actions)

BROWARD COUNTY, a political subdivision of the State of Florida, et al.,

Plaintiffs,

v.

THE STATE OF FLORIDA, et al.,

Defendants.

_____ /

Leon County Case No.
2018 CA 000882
(Applicable to All Actions)

PLAINTIFFS' CONSOLIDATED RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs, by their undersigned counsel, hereby file this response and memorandum of law in opposition to the motions for summary judgment filed by Defendants.[1]

[1] The Governor's motion for summary judgment will be referred to as the "Governor's Motion" and cited as "Gov. MSJ." The remaining Defendants' motion will be referred to as "Defendants' Motion" and cited as "Def. MSJ." For consistency, Plaintiffs will also use the same defined terms as in their motion for summary judgment, filed February 21, 2019 ("Plaintiffs' Motion"). References to Plaintiffs' Motion will be cited as "Pl. MSJ."

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INTRODUCTION

The Penalty Provisions are an affront to American democracy. The Florida Legislature enacted the unprecedented Penalty Provisions for the express purpose of punishing local elected officials for doing precisely what they were elected and subsequently swore to do—represent their constituents. According to Defendants, this punishment was ostensibly necessary because the Legislature inaccurately perceived "abuse and intentional ignorance [of the Preemption Law] by local municipalities" whose officials desired to make their communities safer. *See* Gov. MSJ at 2. In reality, the Penalty Provisions are a gross and unnecessary overreach of power that interferes with fundamental aspects of Florida's system of government.

As more fully explained in Plaintiffs' Motion for Summary Judgment and its accompanying affidavits and resolutions, the Penalty Provisions are so severe and so unclear that they effectively silence deliberation among constituents and their representatives concerning any action that is *arguably* related (no matter how remotely) to the regulation of firearms and ammunition. Even when such an ordinance or rule is properly enacted by a local government in good faith and upon advice of counsel, and even if the ordinance or rule is supported or requested by thousands of residents, the Penalty Provisions invite Defendants and third parties with private agendas to sue the local governments for actual damages and attorney's fees, including a contingency fee multiplier, claiming that the action is preempted by the Preemption Law. § 790.33(3)(b), (f), Fla. Stat. (2018). Additionally, for any public official who is found to have knowingly and willfully violated the Preemption Law, the Penalty Provisions *require* the court to impose a fine up to $5,000, *id.* § 790.33(3)(c), which cannot be paid using public funds, *id.* § 790.33(3)(d), and authorize the Governor to remove the public official from office or terminate his or her employment, *id.* § 790.33(3)(e).

As such, the Penalty Provisions conflict with multiple aspects of the American democratic process, including fundamental constitutional principles that have existed from (and even before) the birth of the Nation and the State. First, the Penalty Provisions require courts to scrutinize the quintessential legislative activity of voting on an ordinance and other basic policy-level activities of local governments and their officials, which violates the absolute legislative immunity of local legislators and the discretionary function immunity of the local governments. Second, the Penalty Provisions improperly expand the Governor's restricted constitutional authority to *suspend* public officials by purporting to authorize the Governor to *remove* those officials instead. Third, the Penalty Provisions impair core political speech, which violates the free speech, association, and petition and instruction rights of the elected officials and their constituents. Fourth, the Preemption

Law—which by virtue of the Penalty Provisions is now penal in nature—is unconstitutionally vague because it fails to provide sufficient notice of what laws are actually preempted or what conduct is otherwise prohibited, thereby encouraging arbitrary enforcement of the Penalty Provisions. Fifth, the Penalty Provisions violate article I, section 10, of the Florida and United States Constitutions by effectively rewriting antecedent contracts between local governments and their administrators.

For the reasons set forth below, the Governor and the remaining Defendants fail to overcome these constitutional deficits in their motions for summary judgment. The Defendants' motions for summary judgment must be denied, and the Plaintiffs' motion for summary judgment should be granted.[2]

SUMMARY JUDGMENT EVIDENCE

In opposition to Defendants' motions for summary judgment, Plaintiffs rely upon and hereby incorporate by reference the evidence and arguments found in their Motion for Summary Judgment, Statement of Facts, and Appendix filed February 21, 2019, as well as the arguments set forth below. *See* Fla. R. Civ. P. 1.510(c).

ARGUMENT

I. THE PENALTY PROVISIONS VIOLATE THE ABSOLUTE LEGISLATIVE IMMUNITY AFFORDED TO THE ELECTED OFFICIAL PLAINTIFFS.

In a few short paragraphs, Def. MSJ at 27–29, Defendants attempt to persuade this Court to ignore over two hundred years of precedent providing elected officials with absolute legislative immunity for legislative actions. *See, e.g.*, *U.S. v. Johnson*, 383 U.S. 169, 178 (1966). Defendants do not dispute that the Penalty Provisions violate legislative immunity on their face. Nor do they

[2] Pursuant to Florida Rule of Civil Procedure 1.420(a), the Daley Plaintiffs voluntarily dismissed Count IX of their Amended Complaint without prejudice, and therefore do not respond to Point I of Defendants' Motion.

dispute that the Elected Official Plaintiffs are generally entitled to legislative immunity. *See* Def. MSJ at 27 (stating that local officials "enjoy" such immunity). Rather, Defendants claim that "[t]he legislative immunity that local officials enjoy derives *exclusively* from the common law" and, therefore, the Florida Legislature "is free to do away with [it] altogether, as long as it does so clearly." *Id.* (emphasis added) (internal quotation marks and citations omitted).

Defendants are incorrect. The Elected Official Plaintiffs' legislative immunity derives not only from Florida common law, but also from the separation of powers provision in the Florida Constitution, Art. II, § 3, Fla. Const., as well as federal common law. As a result, the Legislature cannot abrogate legislative immunity in Florida, and it certainly did not do so when it enacted the Penalty Provisions in 2011.

A. Plaintiffs' Legislative Immunity May Not Be Abrogated by The Florida Legislature Because It Derives Not Only from Florida Common Law, but also from the Florida Constitution and Federal Common Law.

Legislative immunity is a bedrock principle of American democracy born from centuries of tension among separate branches of government. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951); *see also Johnson*, 383 U.S. at 178. "The purpose of this immunity is to [e]nsure that the legislative function may be performed independently without fear of outside interference." *Supreme Court of Va. v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 731 (1980); *U.S. v. Brewster*, 408 U.S. 501, 507 (1972). "Regardless 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).

In Florida, legislative immunity derives not only from general common law (as Defendants admit), but also from the separation of powers provision found in article II, section 3, of the Florida Constitution. In *League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135 (Fla. 2013), and *Florida House of Representatives v. Expedia, Inc.*, 85 So. 3d 517 (Fla. 1st

DCA 2012), the courts explained that "[t]he power vested in the legislature under the Florida Constitution would be severely compromised if legislators were required to appear in court to explain why they voted a particular way," and that "[o]ur state government could not maintain the proper 'separation' required by Article II, section 3 if the judicial branch could compel an inquiry into these aspects of the legislative process." *Expedia*, 85 So. 3d at 524; *see League of Women Voters*, 132 So. 3d at 144–46.

Although the courts in *Expedia* and *League of Women Voters* were specifically addressing a claim of legislative privilege, their reasoning is equally (if not more) applicable to a claim of legislative immunity. Legislative privilege and legislative immunity are "closely related" and based upon the same policy considerations. *Expedia*, 85 So. 3d at 522–23. In fact, "legislative privilege is derived from the principles underlying legislative immunity." *League of Women Voters*, 132 So. 3d at 147 n.11.

In addition to being protected by the state separation of powers provision, legislative immunity in Florida is also protected by federal common law. In *Tenney*, the United States Supreme Court held that federal common law provides legislative immunity to state legislators acting within "the sphere of legitimate legislative activity." 341 U.S. at 376; *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391 (1979) ("[T]he absolute immunity for state legislators recognized in *Tenney* reflected the Court's interpretation of federal law."). Subsequently, in *Bogan*, the Court specifically held that the same immunity applies to local legislators, too. 523 U.S. at 52.

Because the absolute legislative immunity "enjoyed" by the Elected Official Plaintiffs derives not only from Florida common law, but also from the Florida Constitution and federal common law, the Florida Legislature may not "do away with [it] altogether," as Defendants claim. Def. MSJ at 27. It is axiomatic that the Florida Legislature cannot enact statutes that conflict with

the constitution. *See Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 266 (1991) (striking down law passed by the Florida Legislature as a violation of the separation of powers provision of the Florida Constitution); *see also Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 741–42 (Fla. 1961) (noting that the Florida Constitution acts as a limitation on the "power of the state legislature," rather than as a grant of power to the Legislature).

The Florida Legislature also does not have the authority to override the doctrine of absolute legislative immunity that originated in, and developed through, federal common law. *See Republic of Ecuador v. Philip Morris Cos., Inc.*, 188 F. Supp. 2d 1359, 1366 (S.D. Fla. 2002) (stating that the "Florida legislature has no authority under the supremacy clause to eradicate a federal common law rule"), *aff'd sub nom., Republic of Honduras v. Philip Morris Cos., Inc.*, 341 F.3d 1253 (11th Cir. 2003); *see also New Jersey Retail Merchants Ass'n v. Sidamon-Eristoff*, 669 F.3d 374 (3d Cir. 2012) ("It is undisputed that state law can be preempted by federal common law as well as federal statutes."). For example, a Maryland appellate court has held that legislative immunity (including testimonial privilege) applies to local legislators on the basis of federal common law principles, explaining that "subject to the consequences of the Supremacy Clause," local legislative immunity is "co-extensive in scope" with the Constitutional immunity enjoyed by Members of Congress and state legislators. *Montgomery County v. Schooley*, 627 A.2d 69, 74 (Md. App. 1993); *see also Thillens, Inc. v. Cmty. Currency Exch. Ass'n of Illinois, Inc.*, 729 F.2d 1128 (7th Cir. 1984) (holding that the "common law doctrine of official immunity" barred complaint based on the legislative acts of former state legislators, including state statutory claim and state tort claims of fraud, unfair competition, and interference); *Manders v. Brown*, 643 A.2d 931, 938 (Md. App. 1994) (holding that pursuant to the "common law origins of legislative privilege as it applies to local legislative bodies," city councilmembers could be immune for state claims for misrepresentation, interference with contractual relationship, and misapplication of public funds

to the extent those claims were based on legislative acts, and remanding on factual issue of whether officials were acting in legislative capacity).

B. The Absolute Legislative Immunity Protected by Florida's Constitution Applies Equally to Local and State Legislators.

Perhaps recognizing that the Legislature cannot abrogate legislative immunity if it derives from the state constitution (a legal principle Defendants do not attempt to dispute), Defendants offer the Court a false dichotomy. According to Defendants, "whatever legislative privilege or immunity is rooted in" Florida's constitutional separation of powers provisions "does not extend to local officials" because that provision does not apply at the local level. Def. MSJ at 28. In essence, Defendants claim that the legislative immunity enjoyed by state officials is different and more important than the legislative immunity enjoyed by local government officials. Not only do Defendants fail to recognize that legislative immunity is also protected by federal common law, Defendants likewise ignore a long line of Florida cases that apply the separation of powers doctrine to local legislators and governments.

Contrary to Defendants' assertions, Florida courts routinely apply the separation of powers doctrine to preclude the state judiciary from interfering with various aspects of local government, especially local legislative activity. For example, in *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (1979), the Florida Supreme Court evaluated a claim against a local government and stated that "certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance." *Id.* at 1022. In *Trianon Park Condominium Association, Inc. v. City of Hialeah*, 468 So. 2d 912 (Fla. 1985), the Florida Supreme Court evaluated a claim against a local government and set forth the "basic principle[]" that "[j]udicial intervention through private tort suits into the realm of discretionary decisions relating to basic governmental functions would require the judicial branch to second

guess the political and police power decisions of the other branches of government and would violate the separation of powers doctrine." *Id.* at 917–18. In addition, Florida courts regularly decline to rewrite local ordinances or re-zone properties (a local government function) because doing so would violate the separation of powers doctrine.[3]

The consistent application of the separation of powers doctrine at the local level is unsurprising, particularly given that the policy rationales underpinning legislative immunity and separation of powers are equally (if not more) important at the local level. In fact, in *Bogan*, the Supreme Court specifically explained that the identical separation of powers concerns identified by the Florida Supreme Court in *League of Women Voters* and *Expedia* are even more significant at the local level. *See* 523 U.S. at 52–53; *see also Lake Country Estates*, 440 U.S. at 404–05 (stating that the rationale for legislative immunity "is equally applicable to federal, state, and regional legislators").

Tellingly, Defendants do not cite a single case holding that the absolute legislative immunity enjoyed by local officials is different or less important than the immunity enjoyed by

[3] *See, e.g.*, *Wyche v. State*, 619 So. 2d 231, 236 (Fla. 1993) ("We find that it is impossible to preserve the constitutionality of the Tampa ordinance without effectively rewriting it, and we decline to 'legislate' in that fashion. Courts may not go so far in their narrowing constructions so as to effectively rewrite legislative enactments."); *City of Miami Beach v. Weiss*, 217 So. 2d 836, 837 (Fla. 1969) ("This portion of the final decree and the judgment of affirmance directly collides with the decisions of this Court holding that the ultimate classification of lands under zoning ordinances involves the exercise of the legislative power, preventing the courts under the doctrine of separation of powers from the invasion of this field."); *City of Miami Beach v. Lachman*, 71 So. 2d 148, 153 (Fla. 1953) (Roberts, J., concurring) ("Clearly, the basic principle upon which our system of government is based—requiring, as it does, the distinct separation of the executive, legislative and judicial branches of government—prohibits our courts from infringing upon the city's legislative powers with respect to zoning, as well as any other legislative power properly delegated to a municipality by the Legislature."); *City of W. Palm Beach v. Chatman*, 112 So. 3d 723, 729 (Fla. 4th DCA 2013) ("We will not read language into the ordinance, nor rewrite it."); *see also Baker v. Metropolitan Dade County*, 774 So. 2d 14, 20 n.14 (Fla. 3d DCA 2000) ("Separation of powers is violated by authorizing quasi-judicial boards to direct which planning designation will apply to property, which is a legislative function.").

state officials. That is because there is no authority that supports Defendants' unprecedented argument that the Elected Official Plaintiffs' immunity is not also founded in Florida's Constitution. Instead, Defendants cite *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992), and *Citizens for Reform v. Citizens for Open Government, Inc.*, 931 So. 2d 977 (Fla. 3d DCA 2006), neither of which had anything to do with legislative immunity or is controlling here. Def. MSJ at 28.

In *Locke*, Paul M. Hawkes, a candidate who unsuccessfully opposed Representative Dick Locke for a seat in the Florida House of Representatives, filed a public records lawsuit seeking the production of Locke's records relating to the expenditures of state tax money allocated for the maintenance of Locke's office. 595 So. 2d at 34. The "trial court dismissed the case on the grounds that it was without subject matter jurisdiction under the separation of powers doctrine." *Id.* at 33–34. On appeal, one of the two issues before the Florida Supreme Court was whether "the separation of powers doctrine of the Florida Constitution prohibit[s] the judicial branch from construing chapter 119 [governing access to public records] to apply to the legislature."[4] *Id.* at 36. The Florida Supreme Court held that it "[c]learly" does not. *Id.* Thus, *Locke* stands for the unremarkable proposition that the Supreme Court does not violate the separation of powers doctrine when it construes a statute in a manner that may adversely affect either the executive or legislative branch. *Id.* Indeed, "one of [the court's] primary judicial functions is to interpret statutes and constitutional provisions." *Id.* Accordingly, *Locke* is wholly inapplicable and not binding in this context. [5]

[4] The other issue was whether chapter 119 was intended to apply to the state legislature and its members. 595 So. 2d at 36. The court held that it was not. *Id.* at 37.

[5] Defendants rely upon dicta in *Locke*, where the Court stated "that our separation of powers provision was not intended to apply to local governmental entities and officials." Def. MSJ at 28 (citing *Locke*, 595 So. 2d at 36). That dicta addresses the principle of separation of powers in the context of internal activities and operating procedures of the various branches of State government. In that context, one branch of State government may not dictate the internal operations of another branch, such as mandating the compliance with certain public records requirements. The normal internal operations of local governments, however, are "controlled in part by legislative acts." 595

In *Citizens for Reform*, the Third District Court addressed the inapplicability of the state separation of powers provision to the *internal* divisions of authority in local governments—namely, whether there must be a separation of powers between the executive branch of a municipality or a county (e.g., the city or county manager) and the legislative branch of that entity (the city or county commission).[6] Specifically, the court was considering whether a proposed amendment to the Miami-Dade County Charter expanding the Mayor's responsibilities effectively removed the Miami-Dade County Commission as the "governing body" and thus conflicted with article VIII, section 6, of the Florida Constitution. 931 So. 2d at 978–80. The court held that the amendment did not pose a conflict. *Id.* at 990. However, nothing in *Citizens for Reform* suggests that the separation of powers doctrine does not apply when the state judiciary interferes with local legislative activity. In fact, the opinion suggests the opposite; in the concluding paragraph, the court declined to comment on the advisability of the county's proposed amendment because doing so would violate the separation of powers doctrine. *See id.* ("Whether the proposed amendment is ultimately advisable is not for the courts to determine. Our role is strictly limited to filtering proposals for legal and constitutional deficiencies.").

In this case, Plaintiffs do not seek to apply the separation of powers doctrine to a dispute between two coordinate branches of local government. Rather, the Elected Official Plaintiffs are asserting their right to legislative immunity in order to preclude the state judiciary from interfering

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So. 2d at 36. Most importantly, *Locke* does not address the doctrine in the context of legislative immunity, where local legislators have always had absolute immunity for their legislative acts (such as voting on legislation). In this regard, the separation of powers doctrine applies to local legislative immunity because of the limited powers granted to the judicial branch in Article V. *See* Art. V, § 1, Fla. Const. ("The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts."). The judicial branch may never exercise legislative powers, be it at the state or local level.

[6] There can be no concept of separation of powers regarding a municipal judicial branch because there are no municipal courts in Florida.

with and inquiring into the performance of their legitimate *legislative* activities—activities that are certainly not within the limited judicial powers of the courts.[7] *See* Art. V, Fla. Const. Florida's separation of powers provision applies to the state judiciary and prohibits members of that branch from exercising non-judicial powers, including encroachment into state or local legislative enactments or motives for which the Elected Official Plaintiffs have absolute immunity. *See League of Women Voters*, 132 So. 3d at 145; *Citizens for Reform*, 931 So. 2d at 990.

C. Even Assuming that the Florida Legislature Could Have Abrogated Plaintiffs' Absolute Legislative Immunity, It Did Not Do So Here.

Even if the Defendants were correct that local legislative immunity is based solely on Florida common law and that the Legislature could abrogate legislative immunity, the Florida Legislature did not do so when it enacted the Penalty Provisions in 2011.

Defendants admit that the Legislature may abrogate Florida common law only if it does so "clearly." Def. MSJ at 27. In Florida, "[t]he presumption is that no change in the common law is intended unless the statute is explicit and clear in that regard." *State v. Ashley*, 701 So. 2d 338, 341 (Fla. 1997) (quoting *Thornber v. City of Fort Walton Beach*, 568 So. 2d 914, 918 (Fla. 1990)). For example, when the legislature intended to abrogate common law interspousal tort immunity, it did so explicitly and clearly: "The common-law doctrine of interspousal tort immunity *is hereby abrogated* with regard to the intentional tort of battery[.]" § 741.235, Fla. Stat (emphasis added). Here, in contrast, the Legislature did not clearly express an intent to abrogate legislative immunity.[8] *See Tenney*, 341 U.S. at 376 (holding that Congress did not abrogate common law

[7] Section 790.33(3)(c) would presumably require the courts to inquire into the motives and intent of local legislators to determine whether their actions were "knowing and willful."

[8] In fact, the Final Bill Analysis reveals that the Legislature had no intent to abrogate legislative immunity because the Legislature mistakenly believed that no such immunity applied. *See* SOF, Ex. 19 at 4 (finding that the Penalty Provisions were not affected by "[t]he general rule under the common law . . . that legislators enjoy absolute immunity from liability for performance of

legislative immunity when it enacted present-day 42 U.S.C. § 1983); *Bates v. St. Lucie Cty. Sheriff's Office*, 31 So. 3d 210, 213 (Fla. 4th DCA 2010) (finding that the language in section 943.139(4), Florida Statutes, "fails to clearly abrogate, limit or qualify the absolute immunity provided the Sheriff under common law").

For the Legislature to abrogate common law legislative immunity when it enacted the Penalty Provisions in 2011, it would have needed to say clearly that the $5,000 penalty could be imposed against a local legislator simply for voting for an ordinance that was preempted. It did not—nothing in chapter 790 expressly abrogates common law. Rather, section 790.33(3)(c) states "[i]f the court determines that a violation was knowing and willful, the court shall assess a civil fine of up to $5,000 against the elected or appointed local government official or officials or administrative agency head under whose jurisdiction the violation occurred." That language is far from a clear abrogation of common law legislative immunity. It is unclear whether the 'knowing and willful' determination is made with respect to the local government's enactment (as subsection (3)(b) suggests) or an individual legislator's vote. If the former, then why are individual elected officials being fined? Or must all elected officials in the jurisdiction be fined, regardless of how they voted? If the latter, then liability is being imposed for conduct other than enactment (which is required under subsection (3)(a)) because an *individual* legislator is incapable of enacting legislation. The Penalty Provisions, then, do not clearly abrogate the immunity that attaches to the legislative act of voting. *See infra* Part VIII.

Furthermore, legislative immunity is such an important aspect of American democracy that it may not be eviscerated by the Legislature on a whim. In *Kluger v. White*, 281 So. 2d 1 (Fla. 1973), the Florida Supreme Court held that where a particular common law right is so engrained

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legislative acts" because enacting preempted legislation is a "ministerial," as opposed to "legislative," act).

in Florida's history, the Legislature is without power to abolish the right "unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown." *Id.* at 4. In regard to section 790.33, not only did the Legislature fail to clearly abrogate legislative immunity, it also failed to present an overpowering public *necessity* that could justify eradicating a "tradition so well grounded in history and reason."[9] *Tenney*, 341 U.S. at 376. Accordingly, the Penalty Provisions violate the absolute legislative immunity afforded to the Elected Official Plaintiffs.

II. THE PENALTY PROVISIONS VIOLATE THE GOVERNMENTAL FUNCTION IMMUNITY AFFORDED TO COUNTIES AND MUNICIPALITIES.

Defendants' attempt to establish that the local governments are not entitled to governmental function immunity similarly fails. *See* Def. MSJ at 24–27. Like the doctrine of absolute legislative immunity, governmental function immunity has a rich history and is derived from the doctrine of separation of powers enshrined in the Florida Constitution. *See Wallace v. Dean*, 3 So. 3d 1035, 1045 (Fla. 2009) ("Accordingly, we take this occasion to reaffirm that, in Florida, '[g]overnmental immunity derives entirely from the doctrine of separation of powers, not from [the absence of] a duty of care or from any statutory basis.'" (emphasis omitted) (alterations in original)); *Commercial Carrier*, 371 So. 2d at 1015–16 ("Immunity was *always* deemed to have

[9] The stated purpose of the Penalty Provisions is "to deter and prevent the violation of this section and the violation of rights protected under the constitution and laws of this state related to firearms, ammunition, or components thereof, by the abuse of official authority that occurs when enactments are passed in violation of state law or under color of local or state authority." § 790.33(2)(b), Fla. Stat. However, the Legislature did not and could not identify a pattern of knowing and willful violations of state law, let alone a pattern of actual constitutional violations. *See* Pl. MSJ at 27–28. Furthermore, the Legislature expressly acknowledged that if such a pattern did exist, affected citizens would be "able to challenge the validity of such ordinances by suing to have them declared invalid or have a court enjoin enforcement." SOF, Ex. 19 at 4. Thus, the goal of deterring local governments from enacting preempted firearms regulation is not supported by a constitutional purpose or an overpowering public necessity, and cannot outweigh the well-settled public policy and constitutional underpinnings of legislative immunity in Florida.

existed for legislative, quasi-legislative, judicial and quasi-judicial acts of municipalities.") (emphasis added).

As with legislative immunity, the policy underlying governmental function immunity makes sense—"the judicial branch must not interfere with the discretionary functions of the legislative or executive branches of government" in part because these functions "are inherent in the act of governing." *Trianon*, 468 So. 2d at 918. In fact, when governmental function immunity attaches, a court lacks subject-matter jurisdiction to address claims against the government. *See Wallace*, 3 So. 3d at 1044 & n.14.

Defendants do not and cannot contest the applicability of governmental function immunity to local governments. *See Commercial Carrier,* 371 So. 2d at 1022 (applying the doctrine of governmental function immunity to a local government). Instead, Defendants attempt to rely on the Legislature's generalized power to waive sovereign immunity.[10] Def. MSJ at 24–25. However, rather than argue that the Legislature has in fact properly exercised that power here (no such argument could be made), Defendants instead argue that the First District in *Florida Carry, Inc. v. University of Florida*, 180 So. 3d 137 (2015) ("*UF*") has already "held that sovereign immunity does not apply in actions brought under Section 790.33." *Id.* at 25. Defendants misconstrue the court's holding in *UF*.

[10] Sovereign immunity derives from the concept that "the King can do no wrong" and involves a plethora of potential causes of action, only some of which are constitutionally protected (such as governmental function immunity). All of the cases Defendants cite to argue that the Legislature can abrogate governmental immunity deal with a government serving in a business capacity, for which the Legislature can waive immunity; none deal with an act of governance, like legislating. *See Am. Home Assur. Co. v. Nat'l R.R. Passenger Corp*., 908 So. 2d 459, 471–72 (Fla. 2005) (addressing contractual business relationship with private party); *Bifulco v. Patient Bus. & Fin. Servs., Inc.*, 39 So. 3d 1255, 1257 (Fla. 2010) (addressing government as an employer); *Maggio v. Fla. Dep't of Labor & Employment Sec*., 899 So. 2d 1074, 1078–79, 1081 (Fla. 2005) (same).

In *UF*, Florida Carry sued the University of Florida ("UF") and Bernie Machen, UF's then-President, alleging that UF had passed, and Machen had authorized and/or allowed the passage of, rules or regulations expressly prohibited by section 790.33. *Id.* at 140. At the motion to dismiss stage, the trial court held that Machen was immune from liability for damages pursuant to section 768.28(9)(a), which provides immunity from suit for government employees and agents, unless such employee or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. *Id.* at 139. On appeal, the First District Court reversed that ruling because the immunity provided by section 768.28(9)(a) applies *only* in tort suits and was not expressly incorporated into section 790.33. *Id.* at 149–50.

Nothing about that decision addresses the discretionary function immunity of local governments. In contrast to Machen in *UF*, the Plaintiffs here do not seek to extend by implication the statutory immunity for individuals provided by section 768.28(9)(a) to non-tort actions. Rather, Plaintiffs are municipalities and counties that seek to invoke their long-standing immunity from liability for discretionary governmental functions. No such claim was raised by UF (or Machen), so the court did not address it. Thus, contrary to Defendants' representation, that decision is not controlling (or even relevant).

To be sure, the Legislature does have the general authority to waive some aspects of sovereign immunity, such as for workers' compensation claims and for other common law torts. *See* Art. 10, § 13, Fla. Const. However, 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, e.g.*, *Wallace*, 3 So. 3d at 1045; *Commercial Carrier*, 371 So. 2d at 1018–22; *City of Freeport v. Beach Cmty. Bank*, 108 So. 3d 684, 687 (Fla. 1st DCA 2013).

To illustrate, consider the enactment of section 768.28, Florida Statutes, which was intended "to waive sovereign immunity on a broad basis" for tort claims throughout the state. *Commercial Carrier*, 371 So. 2d at 1020. Although that waiver statute contained no exception for discretionary functions, the Florida Supreme Court nevertheless held that "certain policy-making, planning or judgmental governmental functions *cannot* be the subject of traditional tort liability." *Id.* at 1020 (emphasis added). The Florida Supreme Court explained, "This is so because certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance." *Id.* at 1022.

Interestingly, despite recognizing that the Penalty Provisions create a statutory cause of action that is expressly intended to punish local governments for enacting and enforcing laws that are subsequently determined by a court to be preempted, Defendants attempt to distinguish *Commercial Carrier* and its progeny by contending that the Penalty Provisions "do not subject local planning decisions to such scrutiny." *See* Def. MSJ at 26. Rather, Defendants claim the Preemption Law *prohibits* "local planning decisions in the field of firearms and ammunition, so there is no lawful planning decision for a finder of fact to second guess." *Id.* at 27. In other words, Defendants erroneously argue that the Penalty Provisions somehow transform what has always been a discretionary government function—determining what laws to enact—into a ministerial one. While the line between discretionary and ministerial acts is sometimes difficult to draw, it is not so here. The enactment of laws and regulations is "inherent in the act of governing" and therefore is clearly a discretionary function of government, notwithstanding the existence of an unclear Preemption Law. *See Trianon*, 468 So. 2d at 918–19.

Moreover, as Plaintiffs have repeatedly explained, they are seeking to enact laws and regulations that they genuinely believe *are not preempted* by the Preemption Law, yet the Penalty Provisions remove good faith and upon advice of counsel as a defense. § 790.33(3)(b), (f), Fla.

Stat. Therefore, the effect of the Penalty Provisions is not, as Defendants claim, to prohibit unlawful actions, but rather to trample local governments' discretionary function immunity and create liability for historically protected policy-making, planning, and judgmental decisions concerning the enactment of ordinances or regulations that could arguably fall within the scope of the Preemption Law. *See infra* Part V.C; SOF ¶¶ 9–12. Accordingly, the Penalty Provisions violate the Plaintiffs' governmental function immunity. *See* Pl. MSJ at 13–17.

III. THE LEGISLATURE LACKS THE AUTHORITY TO EXPAND THE GOVERNOR'S POWERS OVER ELECTED OFFICIALS BEYOND WHAT IS SET FORTH IN FLORIDA'S CONSTITUTION.

In defense of the authority conferred upon the Governor in section 790.33(3)(e), Florida Statutes, to remove from office any municipal or county elected official who knowingly and willfully violates the Preemption Law, Defendants advance seven arguments, none of which are availing.

A. The Doctrine Of *Expressio Unius* Has Been Applied By The Florida Supreme Court to The Interpretation of The Florida Constitution.

1. Defendants Ignore Controlling Precedent.

Defendants' argument regarding the inapplicability of the *expressio unius* doctrine in cases of constitutional interpretation is remarkable in its failure to cite controlling Florida precedent in support of the argument. The Florida Supreme Court has confirmed on multiple occasions that the doctrine is applicable in cases of constitutional interpretation.

In *Bush v. Holmes,* 919 So. 2d 392 (Fla. 2006), the Court expressly rejected the dissent on which Defendants choose to rely, Def. MSJ at 39, and made clear that the *expressio unius* doctrine *does* apply to cases involving constitutional interpretation:

> [W]here 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.*

Holmes, 919 So. 2d at 407 (emphasis added) (quoting *Weinberger v. Bd. of Pub. Instruction*, 112 So. 253, 256 (1927)).

Prior to *Bush*, the Florida Supreme Court applied the well-established principle of *expressio unius est exclusio alterius* in matters of constitutional interpretation on numerous occasions. *See, e.g., In re Adv. Op. of Governor Civil Rights*, 306 So. 2d 520, 523 (Fla. 1975); *S & J Transp., Inc. v. Gordon*, 176 So. 2d 69, 71-72 (Fla. 1965); *Weinberger v. Board of Public Instruction*, 112 So. 253, 256 (Fla. 1927). Defendants fail to address any of these decisions, and these decisions lay waste to the suggestion that the *expressio unius* doctrine finds no place in constitutional interpretation.[11] *See also Bruner v. State Comm'n on Ethics*, 384 So. 2d 1339, 1340-41 (Fla. 1st DCA 1980) (holding that the Legislature may not vary from the constitutional allocation of power in the gubernatorial suspension of public officials).

Defendants' legal authorities, such as they are, at most suggest that the doctrine should be applied with caution—not that it has no possible application in cases of constitutional interpretation. *See Holmes*, 919 So. 2d at 420 (Bell, J., dissenting) (stating the doctrine "should be applied with caution"); *see also Housing Opportunities Project v. SPV Realty, LC*, 212 So. 3d 419, 422 n.5 (Fla. 3d DCA 2016) (cautioning against an "over-expansive" application of the doctrine when interpreting the constitution). Nevertheless, assuming that Defendants' view of the doctrine were correct (it is not), there is every reason to apply the doctrine in *this* instance, where the

[11] In light of these controlling Florida precedents, Plaintiffs need not devote time to rebutting or distinguishing the Idaho Supreme Court's 60-year old contrary conclusion in *Eberle v. Nielson*, 306 P.2d 1083 (Idaho 1957), or any of the other out-of-state "authorities" cited by Defendants.

Legislature's overt expansion of the Governor's constitutional authority runs headlong into other constitutional mandates.

Section 790.33(3)(e) purports to allow the Governor to remove from office a duly elected representative of the people because a determination has been made that the official knowingly and willfully violated the preemption. However, article I, section 1, of the Florida Constitution expressly states, "All political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people." Art. I, § 1, Fla. Const. The Legislature's expansion of the Governor's authority runs afoul of this provision by directly interfering with the people's right to exercise their political power and elect local representatives to govern their counties and municipalities.[12] It is difficult to imagine a more sacrosanct exercise of the political power in a democracy than the election of one's representatives, especially at the local level where citizen access is greatest. In the context of this express reservation of political power to the people, the voters of Florida also approved a constitution that sets forth express and *limited* situations in which the Governor may interfere with (or more accurately, usurp) the people's exercise of their political power by suspending—not removing—officials. Those unique situations are enumerated in article IV, section 7, of the Florida Constitution. What the Legislature has attempted to do in creating the removal power set forth in section 790.33(3)(e) does not fall within the ambit of any subsection of article IV, section 7.

[12] Defendants cite to decisions from Colorado and North Carolina rejecting the application of the doctrine in constitutional interpretation cases because of similar reservation provisions in the constitutions of those states. Def. MSJ at 39 n.13. Aside from the fact that the Florida Supreme Court has rejected the holdings in those decisions, as explained above, neither the Colorado nor North Carolina decision involved a situation where the state legislature sought to confer powers on the governor that interfered with the people's reservation and exercise of their political power, as is occurring here.

2. The Governor Has Conceded the Limitations on His Authority in Another Proceeding.

Ironically, in *Jackson v. DeSantis*, Case No. SC19-329, currently pending before the Florida Supreme Court, the Governor has essentially conceded the limitations on his authority imposed by the Florida Constitution. In that proceeding, the Governor has opposed a petition for writ of quo warranto that challenged his authority to suspend the Superintendent of Schools for Okaloosa County.[13] In his response, the Governor made the following assertions:

- "[T]he Florida Constitution *limits* the type of public office under the [Governor's] suspension authority and the grounds for suspension. Fla. Const. art. IV, § 7(a)." *Jackson* Response at 3–4 (emphasis added).

- "Article IV, section 7 of the Florida Constitution encompasses the *full and complete method* of constitutional authority for gubernatorial suspensions and senatorial removals or reinstatements[.]" *Id.* at 8 (emphasis added).

- "By the text of the Florida Constitution, the authority to *suspend* a public officer is committed to the Governor. Fla. Const. art. IV, § 7. And the authority to review the Governor's suspension is committed to the Florida Senate. Fla. Const. art. IV, § 7(b). The Florida Senate has the *exclusive* authority to *remove* or reinstate a suspended public officer…. Fla. Const. art. IV, § 7." *Id.* at 9 (emphasis added except as to "exclusive").

- "The explicit language of Article IV, Section 7(a) provides *clear, unambiguous requirements and limitations* on the Governor's suspension authority…. Article IV, Section 7(b) gives *exclusive authority to remove* … a suspended officer *to the Florida Senate, thereby prohibiting the Governor from unilaterally removing a public officer*." *Id.* at 14 (emphasis added).

Each of the foregoing positions is squarely at odds with Defendants' (including the Governor's) assertions that the Legislature is free to expand the suspension authority of the Governor and convert it into a removal authority based on grounds not articulated in the Florida Constitution.

[13] Filing # 86726151 E-Filed 03/20/2019 07:29:06 PM (the "*Jackson* Response"). The *Jackson* Response may be found here: https://efactssc-public.flcourts.org/casedocuments/2019/329/2019-329_response_52453_response.pdf.

These concessions alone, made by the Governor to the Florida Supreme Court, justify rejecting Defendants' argument regarding the Governor's removal authority under section 790.33(3)(e).

B. Defendants' Argument That the Legislature May Expand the Powers of the Governor Knows No Logical Limit and Ignores the Constitutional Limitations on Gubernatorial Authority.

Under Defendants' theory that the Legislature may "expand" the Governor's "baseline authority," there is no limit to what powers the Legislature could confer on the Governor, irrespective of what the Florida Constitution says. Certainly, Defendants do not suggest a logical stopping point for the exercise of such broad amplification of the Governor's powers. Moreover, the only case Defendants rely upon in support of this novel proposition, *Nichols v. State ex rel. Bolon*, 177 So. 2d 467 (Fla. 1965), is unavailing.

In *Nichols*, the Florida Supreme Court examined article VI, section 5, a constitutional provision that directed the Legislature "to exclude from 'every office of honor, power, trust or profit' all persons who have been convicted of certain crimes." *Id.* at 468. The Legislature had by special act incorporated an additional qualification for office in the charter of the City of Melbourne. *Id.* The Florida Supreme Court rejected the application of the *expressio unius* doctrine because the constitutional provision in question "does not deal with the general subject of disqualifications of persons for office, but it simply makes it the duty of the Legislature to enact the necessary laws to exclude from every office within the state the persons falling within the classes therein named." *Id.* The Court further explained, "*[This section] grants no power or authority, but simply prescribes a duty*, requiring the Legislature to enact laws excluding from every office the persons enumerated therein; but the language used cannot be said to forbid the Legislature from enacting laws excluding other persons than those named from statutory offices." *Id.* at 469 (emphasis added) (quoting *Moodie v. Bryan*, 39 So. 929 (Fla. 1905)).

Here, in contrast, the constitutional provision at issue—article IV, section 7—*does* grant a specific "power or authority" to the Governor. It deals specifically with the subject of how the Governor may *suspend* elected county and municipal officials. For the reasons articulated above, this limited authority was approved by the people in the context of reserving to themselves their political power. What Defendants propose by their argument in favor of unfettered discretion of the Legislature to expand the Governor's "baseline authority" (whatever that means) cannot survive serious constitutional scrutiny.

Defendants' parallel, yet highly generalized contention that the Legislature has already "added to" the Governor's authority by enacting Chapter 14, Florida Statutes, misses the point entirely. The question is not whether the Legislature may enact legislation relating to the Governor; certainly, it can. But nothing in Chapter 14—which addresses the Governor's exercise of his duties, where he may live, and whether he may appoint a private secretary—runs afoul of the constitutional provisions that expressly articulate how the Governor may exercise his constitutionally conferred powers. Tellingly, Defendants never articulate how any provision of Chapter 14 might be considered to expand upon or vary from gubernatorial authority expressly addressed in the constitution.

Defendants' reliance on *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011), is equally misplaced. First, Defendants have excerpted a single phrase of dicta at the conclusion of the Florida Supreme Court's decision and suggested that it is the holding of the case. Def. MSJ at 38. This misapprehends the decision. The case did *not* involve the Legislature conferring rule-making authority on the Governor or addressing its propriety under any specific set of circumstances. *Whiley* involved a citizen's petition for writ of quo warranto "seeking an order directing [the] Governor of the State of Florida, to demonstrate that he has not exceeded his authority, in part, by suspending rulemaking through Executive Order 11–01." *Id.* at 705. The Court granted the petition

and concluded that "[a]bsent an amendment to the Administrative Procedure Act itself or other delegation of such authority to the Governor's Office by the Florida Legislature, the Governor has overstepped his constitutional authority and violated the separation of powers" by suspending (through executive order) the rule-making authority of agencies under his direction. *Id*.

Even if *Whiley* had involved a delegation of rule-making authority to the Governor, it is difficult to discern what relevance such a decision would have here. Section 790.33(3)(e) does not purport to confer rule-making authority on the Governor. Rather, it confers absolute discretion to the Governor to remove from office a duly elected local official in complete contravention of the narrow suspension powers allocated to the Governor by article IV, section 7. Therefore, *Whiley* is inapposite.

C. Defendants' Separation of Powers Argument Misconstrues Plaintiffs' Argument Regarding the Role of the Senate with Respect to County Officials.

Defendants devote considerable effort to arguing why the separation of powers doctrine does not bar section 790.33(3)(e). Def. MSJ at 39–42. Plaintiffs, however, have not argued that the Legislature's granting of removal powers to the Governor violates the separation of powers doctrine. Instead, Plaintiffs contend that the Florida Constitution prescribes how an elected official may be removed from office and that the Legislature lacks the authority to vary that process. For this reason, much of Defendants' arguments regarding the doctrine are a non sequitur.

Section 7(a) of article IV sets forth a specific procedure for gubernatorial *suspension* of state or county officials on grounds of "malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony[.]" Art. IV, § 7(a), Fla. Const. The same provision allows the Governor to temporarily fill the vacancy for the duration of the suspension. The power to remove a state or county official, though, rests exclusively with the Florida Senate as set forth in section 7(b): "The senate may, in proceedings

prescribed by law, *remove* from office or reinstate the suspended official and for such purpose the senate may be convened in special session by its president or by a majority of its membership." *Id.* at § 7(b) (emphasis added). The Governor plays no role in the *removal* of the state or county official.

Article IV, section 7(c), which governs suspension of municipal officials, is even more restrictive in terms of what the Governor is permitted to do. That provision allows for gubernatorial suspension only when a municipal official has been *indicted*, and the suspension continues until such time as the official is acquitted. Art. IV, § 7(c), Fla. Const. The only other provision that confers constitutional authority on the Governor vis-à-vis municipal elected officials is article IV, section 1(b), which allows the Governor to commence judicial proceedings to require a municipal official to "compl[y] with any duty or restrain any unauthorized act." Art. IV, § 1(b), Fla. Const. The authority does not extend to removal of the official from elected office.

D. *Marcus* was Correctly Decided.

In criticizing the *Marcus* court's statement that section 790.33(3)(e) cannot compel the Governor to remove an elected official from office, Def. MSJ at 42–43, Defendants overlook the broader analysis in *Marcus.* Specifically, they ignore the following conclusion:

> [Section 790.33] may not constitutionally authorize the Governor to remove [county officials'] from office in the event 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.

Marcus v. Scott, No. 2012-CA-001260, 2014 WL 3797314, at *3 (Fla. 2d Cir. Ct. June 2, 2014). This reasoning stands as an independent basis for the *Marcus* court's conclusion, irrespective of whether the court correctly believed that section 790.33(3)(e) compels the Governor to remove any particular official.

E. The Governor's Reliance on the Caveat Provision in Article IV, Section 7(C), is Misplaced.

The Governor erroneously contends that some significance must be given to the fact that article IV, section 7(c) allows the Governor to suspend an indicted official and fill the vacancy, but concludes with the phrase, "unless these powers are vested elsewhere by law or municipal charter." Gov. MSJ at 11.[14] This provision, the Governor argues, allows the Legislature to vary the mechanism prescribed by the Florida Constitution for removal of municipal officials. This argument misconstrues the caveat provision.

The term "these powers" is a reference to the powers expressly identified in subsection 7(c), namely, the power to suspend upon indictment and the power to fill the vacancy created by the suspension. Nowhere in the constitutional provision is there a reference to the power to suspend, much less remove, an elected official based on a willful violation of a statutory preemption. As such, notwithstanding the Governor's assertion to the contrary, the authority conferred by section 790.33(3)(e) does not "fall squarely" within the exception in article IV, section 7(c).

In an effort to shore up the argument, the Governor asks the Court to consider section 112.51, Florida Statutes, which enumerates various circumstances under which the Governor may *suspend* municipal officials. The only provision that addresses the Governor's power to remove a municipal official, however, is section 112.51(5), Florida Statutes, which contemplates removal if the municipal official "is convicted of any of the charges contained in the *indictment* or information by reason of which he or she was suspended under the provisions of this section[.]" § 112.51(5), Fla. Stat. (emphasis added).[15] Every other provision in section 112.51 addresses the Governor's

[14] The other Defendants do not advance this argument in their motion.

[15] This parallels the authority conferred in article IV, section 7(c), which allows the Governor to suspend a municipal official when he or she is indicted.

authority to suspend an indicted or convicted municipal official and thus is in harmony with article IV, section 7(c).[16]

F. Section 790.33(3)(E) Cannot Be Salvaged By Re-Writing The Statute.

The Governor also argues that this Court should construe section 790.33(3)(e) in such a manner as to uphold its constitutionality. Gov. MSJ at 11–12. The Governor contends the Court should simply interpret the statutory removal provisions as "shorthand" to require the "full removal process articulated in Article IV, Section 7(a) and (b)." *Id.* at 12. This argument fails for two reasons.

First, while Plaintiffs do not dispute the basic tenet of statutory construction that statutes should be construed so as to uphold their constitutionality, that directive does not extend to re-writing the statute or grafting on procedures that were never included in the statutory scheme. *See, e.g., Westphal v. City of St. Petersburg*, 194 So. 3d 311, 321 (Fla. 2016) ("[E]ven if potentially unwise and unfair, it is not the prerogative of the courts to rewrite a statute to overcome its shortcomings."); *Wyche*, 619 So. 2d at 236 ("Courts may not go so far in their narrowing constructions so as to effectively rewrite legislative enactments." (citing *Firestone v. News–Press*

[16] Although not an issue in this case, to the extent section 112.51(1) may be read to allow the Governor to suspend a municipal elected official simply because the *Governor* believes the official is incompetent or has been negligent, it is unconstitutional for the same reasons section 790.33(3)(e) is. Plaintiffs are unaware of any reported decision that has upheld the constitutionality of section 112.51(1) in the face of a challenge that it violates Article IV, Section 7 of the Florida Constitution. Only one decision has ever addressed the interplay of section 112.51(1) and Article IV, Section 7: *In re Advisory Op. to the Governor Request of July 12, 1976*, 336 So. 2d 97 (Fla. 1976). In that decision, Governor Askew inquired of the Court with respect to the mayor of the City of Jacksonville and a predecessor version of section 112.51(1): " If Article IV, Section 7(c) which authorizes suspension of a municipal official indicted for a crime is controlling, must the indictment be a result of actions arising directly or indirectly out of or pertaining to official conduct or duties or is [section] 112.51(1) an unconstitutional limitation on the constitutional duties of the governor under Article IV, Section 7(c)?" *Id.* at 98. The Court declined to answer the question because it concluded that the Jacksonville mayor was actually a county official and had to be removed pursuant to Article IV, Section 7(a), which provided additional grounds for suspension of the official. *Id.*

Publ'g Co., 538 So. 2d 457, 460 (Fla. 1989))). The Governor cites no precedent that holds that judicial re-writing of statutes is permissible to sustain the statute's constitutionality. The one case cited by the Governor, *State ex rel. Ervin v. Cotney*, 104 So. 2d 346 (Fla. 1958), merely stands for the proposition that a statute must be construed in such a manner as to preserve its constitutionality—but only when the statute is "susceptible" of such an interpretation. *Id.* at 349. The Penalty Provision are not so "susceptible."

The Governor's proposed interpretation would require this Court to read "removal from office by the Governor" to mean "removal from office of county officials by the Senate after suspension by the Governor." Indeed, as the Governor effectively concedes, Gov. MSJ at 13 n.3, section 790.33(3)(e) conflicts with article II, section 3, and only a complete rewriting would save it. However, judicial rewriting of statutes far exceeds cannons of construction and would usurp the role of the Legislature. Any such amendment is the task of the Legislature, not this Court.

Second, while sections 7(a) and 7(b) contemplate removal of state and county officials by the Florida Senate, section 7(c) does no such thing as to municipal officials. That provision merely provides for suspension upon indictment and reinstatement upon acquittal. The Court cannot graft onto section 7(c) a mechanism that was never contemplated to be part of the constitutional process.

IV. THE PENALTY PROVISIONS VIOLATE PLAINTIFFS' FREE SPEECH, ASSOCIATION, PETITION, AND INSTRUCTION RIGHTS.

A. Contrary to Defendants' Assertions, the Penalty Provisions Burden Plaintiffs' Free Speech and Association Rights.

Defendants argue that the Penalty Provisions do not violate Plaintiffs' fundamental rights to freedom of speech and freedom of association because the Preemption Law prohibits "only the enactment or enforcement of firearms regulations," and the enactment and enforcement of ordinances is "non-expressive conduct" under the Supreme Court's decision in *Nevada Commission on Ethics v. Carrigan*, 564 U.S. 117 (2010). Def. MSJ at 50–51. Defendants' two-

paragraph argument fundamentally misunderstands the reasons why the Penalty Provisions violate Plaintiffs' speech and association rights.

As explained in detail in Plaintiffs' Motion, the Penalty Provisions violate Plaintiffs' speech and association rights for reasons that have nothing to do with the expressive or non-expressive nature of voting. Rather, the Penalty Provisions impose substantial burdens on the ability of both constituents and their elected officials to engage in core political speech leading up to a vote, as the Penalty Provisions are so severe that elected officials have not even considered bringing an ordinance to the floor for debate and passage due to fear of being subjected to them. *See* Pl. MSJ at 23–28. Likewise, with no chance of an ordinance being passed, both elected officials and citizens have been (and will continue to be) substantially chilled from engaging in the right to associate with each other in order to advance the passage of firearms safety ordinances. *See id.* at 29–30. As the practical effect of the Penalty Provisions is to chill core political speech and association surrounding firearms ordinances, the Penalty Provisions violate Plaintiffs' right to free speech, regardless of the fact that the Penalty Provisions only purport to punish voting for and enacting such ordinances. *See, e.g.*, *Village of Schaumburg v. Citizens for a Better Envt.*, 444 U.S. 620 (1980) (finding that law regulating charitable solicitations in residential neighborhoods had ancillary effect of infringing speech and therefore violated the First Amendment regardless of the law's actual intent).

Far from being foreclosed by *Carrigan*, the Supreme Court in that case expressly left open the door for this Court to accept the argument advanced by Plaintiffs here. In *Carrigan*, the Court was clear that its opinion did not rule on the argument that the challenged statute burdened speech and association rights, as that issue was not decided below. *See* 564 U.S. at 128. In fact, the only Justice to consider the issue (Justice Kennedy, in concurrence) stressed that a statute like the Penalty Provisions would "impose substantial burdens" on the speech and association that takes

place "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." *Carrigan*, 564 U.S. at 129 (Kennedy, J., concurring).

The Supreme Court's holding that voting is not expressive activity is irrelevant to the argument advanced by Plaintiffs and embraced by Justice Kennedy—where a law like the Penalty Provisions impedes a legislative official "from voting on matters advanced by or associated with a political supporter," the law impedes speech and association rights due to "the logical and inevitable burden on speech and association that preceded the vote." *Id.* at 131 (Kennedy, J., concurring). As illustrated by Plaintiffs' affidavits and resolutions, the burdens that the Penalty Provisions impose on Plaintiffs' speech and association rights are clear and numerous. The Elected Officials Plaintiff have spoken less to each other during public meetings, and they have spoken less to their constituents, to groups active in the political process, to the press, and to the public at large. *See, e.g.*, SOF ¶¶ 13, 13(b), 14, 14(a), 14(b). For example, Mayor Frank C. Ortis has averred that in the absence of the Penalty Provisions, if the City of Pembroke Pines were to put a non-preempted firearm safety ordinance up for a vote, he would "speak in favor of the [ordinance] at Commission meetings, would speak to [his] colleagues during public meetings about the importance of passing it, and would speak to constituents and the media about why [he] would pass it." *See id.* ¶ 13(b). As a result of the Penalty Provisions, however, he does "not engage in these debates, speeches and conversations, even though [he] would like to be able to do so." *Id.*

Citizens, including Plaintiff Turkel, have also been severely chilled from engaging in the advocacy they find most meaningful, and have been unable to make issues they find important the focus of discussion. *See, e.g., id.* ¶¶ 5(a), 5(b), 5(c). For example, Plaintiff Turkel finds advocacy at the local level far more meaningful than at the state level, because it is "very important for [her] to improve the community in which [she] raise[s] [her] daughter." *Id.* ¶ 5(a). However, as a result

of the Penalty Provisions, she has been "deterred from engaging in, and speak[s] less on, gun safety issues in [her] City." *Id.*

Likewise, the Penalty Provisions have impeded Plaintiffs' abilities to associate with one another and with other citizens in order to pursue their respective political agendas. *See, e.g.*, *id.* ¶¶ 5(a), 5(b), 5(c), 14, 14(a), 14(b). For example, Commissioner Dan Daley occasionally associates with his fellow elected officials "at public meetings to create coalitions to pass particular ordinances." *Id.* ¶ 14(b). He finds that these associations are "effective in passing ordinances and in getting [his] preferred agendas heard." *Id.* Nonetheless, while Commissioner Daley would like to associate with his colleagues in a similar manner to get his preferred safety ordinance passed, he has not done so due to fear of the Penalty Provisions (even though he genuinely believes his preferred ordinance is not preempted). *Id.* Similarly, as a result of the Penalty Provisions and their effect on her elected officials, Plaintiff Turkel has been chilled from forming a "group capable of persuading local legislators to pass the changes [she (and the group)] desire." *Id.* ¶ 5(a).

For the reasons explained in Plaintiffs' Motion and in Justice Kennedy's concurrence, these deprivations strike at the heart of the rights to free speech and association and thus violate Plaintiffs' fundamental rights. *See* Pl. MSJ at 21–30.

B. The Penalty Provisions Violate Plaintiffs' Rights to Petition and Instruct their Local Legislators.

Defendants' argument that the Penalty Provisions do not violate constituents' rights to petition and instruct their local representatives likewise misses the mark.[17] Defendants concede, as they must, that "citizens have a right to petition their democratically elected local officials." *See*

[17] While Defendants reference the right to instruct in their heading, their brief contains no actual discussion of the right to instruct, despite the fact that Florida courts have repeatedly recognized that the right to instruct is separate and unique from the right to petition. *See* Pl. MSJ at 30. The Penalty Provisions violate the right to instruct for the reasons explained in Plaintiffs' motion.

Def. MSJ at 52. Yet, according to Defendants, because the Penalty Provisions penalize elected officials rather than constituents, the right to petition is not impaired. *See id.* Defendants fundamentally misunderstand what the right to petition means. As a direct result of the Penalty Provisions, Plaintiff Turkel has been rebuffed by her legislators whenever she seeks to petition them on the need for sensible, local firearm safety regulations. *See* SOF ¶ 5(a). Where, as here, citizens have no means of participating meaningfully in the local political process, their rights to petition are infringed, regardless of whether the Penalty Provisions were intended to penalize only representatives. To hold otherwise would render the right to petition illusory. *See* Pl. MSJ at 30–31.

Defendants further argue that "Plaintiffs are mistaken to the extent they suggest that the right to petition protects constituents' interest in achieving a symbolic, if not legally effective, official act as a result of lobbying their representatives." Def. MSJ at 53. Defendants misunderstand Plaintiffs' argument. Plaintiffs have repeatedly contended that the Elected Official Plaintiffs wish to pass ordinances that they genuinely believe *are not preempted* by the Preemption Law, but have refrained from doing so due to the Penalty Provisions. *See* SOF ¶¶ 9–12. In the absence of such provisions, constituents like Plaintiff Turkel would have a far easier time petitioning their representatives for relief in the form of a valid ordinance—and possess a *meaningful*, rather than hollow, right. *See, e.g.*, *id.* ¶¶ 5(a), 13, 13(a).

Perhaps recognizing the severe impact that the Penalty Provisions actually have on citizens' right to petition, Defendants add in a throwaway sentence noting that the Preemption Law "encourages local officials to hear their constituents' concerns and promote them at the State level." Def. MSJ at 52 (citing § 790.33(2), Fla. Stat.). Implicit in Defendants' statement is the admission that local officials should be able to represent their constituents by acting on the concerns that constituents bring to them through the right to petition—an obligation that the

Penalty Provisions foreclose. While local elected officials can theoretically discuss local concerns with state officials, local officials have authority *to act* only at the *local level*. Any petitioning for the redress of grievances at the local level would remain substantially burdened by the Penalty Provisions.

Aside from proving Plaintiffs' point, Defendants' statement fails to save the Penalty Provisions for at least two reasons. As an initial matter, the fact that local officials could lobby the state legislature is irrelevant to Plaintiffs' free speech and association claims. Plaintiffs are entitled to disseminate their ideas and raise their concerns in the manner that "they believe to be the most effective." *Meyer v. Grant*, 486 U.S. 414, 424 (1988) ("That appellees remain free to employ other means to disseminate their ideas does not take their [preferred form of] speech … outside the bounds of First Amendment protection."). As stated in multiple affidavits, Plaintiff Turkel and other constituents of Plaintiff municipalities believe that their concerns are best addressed at the local level and they seek to petition their local officials accordingly. *See* SOF ¶¶ 5(a), 5(b), 5(c).

Second, despite Defendants' claims to the contrary, section 790.33(2) does not invite local elected officials to seek to take action at the state level. Rather, that section sets forth the State's intent to ensure that local elected officials do not attempt to pass even valid local regulations by making it such that elected officials fear being subjected to draconian penalties even when those officials genuinely intend to take only valid actions in furtherance of their duties to their constituents. *See* § 790.33(2), Fla. Stat.; SOF, Ex. 19 at 2–3.

As the Penalty Provisions impair each of Plaintiffs' rights to free speech, free association, petition, and instruction, they should be struck down.

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

Defendants' arguments that the Preemption Law is not unconstitutionally vague are based on misstatements of applicable law, carefully avoid the fact that Attorney General opinions are non-binding and sometimes inaccurate, ignore the case law demonstrating the uncertainty of the statute's meaning, and succeed only in underscoring the Preemption Law's vagueness.

A. Defendants Are Incorrect as to the Appropriate Legal Standard.

1. Because of Its Penal Nature, the Preemption Law Should Be Construed Against the State.

Defendants first argue that the penalties are civil and therefore the Court should apply a more deferential legal standard. Def. MSJ at 11–12. However, the relevant question under Florida law is not whether a statute is criminal or civil, but whether the penalties it prescribes are "penal." *See* Pl. MSJ at 34. In Florida, courts look at the harshness of a statute's penalties, regardless of whether those penalties are categorized as "civil" or "criminal," to determine whether a statute is "penal." *See* Pl. MSJ at 34. Under this well-established precedent, a $5,000 fine, loss of employment, loss of indemnification, and liability for up to $100,000 is, without a doubt, "penal" in nature. *See id.*; § 790.33(3), Fla. Stat.[18] Because the Penalty Provisions impose civil penalties that are penal in nature, any doubt as to the law's constitutionality should be resolved against the state. *See State v. Wershow*, 343 So. 2d 605, 608 (Fla. 1977).[19]

[18] By way of comparison, a $5,000 fine is the *maximum* fine for a third-degree felony and *five times* the maximum fine for a first-degree misdemeanor. *See* § 775.083(1)(c)-(d), Fla. Stat.

[19] Defendants' two cases on this point are inapposite, as neither case involves penalties at all. *See Scudder v. Greenbriar C. Condo. Ass'n, Inc.*, 663 So. 2d 1362, 1367–68 (Fla. 4th DCA 1995); *Leib v. Hillsborough Cty. Pub. Transp. Comm'n*, 558 F.3d 1301, 1310 (11th Cir. 2009). *Scudder* simply discusses issues dealing with a condominium association's assessment of costs. 663 So. 2d at 1367–68. And *Leib* involves the denial of a limousine license. 558 F.3d at 1310. Both cases are, therefore, irrelevant to the Court's analysis.

2. The Preemption Law Does Not Need to Be Vague in All Contexts in Order to Be Unconstitutional.

Defendants next ask the Court to forgive the Preemption Law's incomprehensible terms because a small subsection of conduct is obviously prohibited. Def. MSJ at 13. Defendants' argument relies on bad law. The United States Supreme Court has clarified that simply because some conduct "clearly falls within [a vague provision's] grasp" is not sufficient for the law to survive a vagueness challenge. *Johnson v. United States*, 135 S. Ct. 2551, 2560–61 (2015); *see also State v. Carrier*, 240 So. 3d 852, 860 (Fla. 2d DCA 2018) (recognizing *Johnson* "applied a more expansive vagueness analysis than prior case law might have suggested" (quoting *United States v. Bramer*, 832 F.3d 908, 909 (8th Cir. 2016))). Vagueness pervades the Preemption Law, and simply because a small subset of conduct is obviously prohibited does not save the unconstitutionally vague law.

3. The Preemption Law's Scienter Provision Does Not Save the Unconstitutionally Vague Law.

Defendants assert that the Penalty Provisions' scienter requirement immunizes it from vagueness challenges. Defendants' argument is incorrect for two reasons. First, the private cause of action authorized under subsection (f) of the Penalty Provisions is not limited to knowing and willful violations. Defendants do not argue otherwise. *See* Def. MSJ at 10 (arguing the scienter issue only as to subsections (c), (d), and (e)).

Second, "a scienter requirement may save a statute 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*." *State v. Mark Marks, P.A.*, 698 So. 2d 533, 538 (Fla. 1997) (citation omitted and emphasis added). For example, *Gonzales v. Carhart*, 550 U.S. 124 (2007), the case on which Defendants rely for their scienter argument, Def. MSJ at 11, involved a statute that banned doctors from knowingly performing certain abortions procedures. 550 U.S. at 149. In that

case, the Court found the law constitutional because it "set forth 'relatively clear guidelines as to prohibited conduct'" and required a finding that the doctor "deliberately" flouted the law before a violation was found. *Id.* (citation omitted).

With the Penalty Provisions, however, no such "clear guidelines" are present. As argued in Plaintiffs' Motion, the statute does not clearly say *what* it prohibits.[20] Pl. MSJ at 35–38. For example, the Penalty Provisions are vague as to whether a commission's enactment of an obviously preempted ordinance subjects all individual commissioners to penalties and potential removal from office—regardless of whether all commissioners voted for the preempted ordinance.[21] *See id.* at 39 n.20. And as explained in more detail below, there are no clear guidelines as to the extent Plaintiffs may go when acting in their proprietary capacity or otherwise. *See infra* Part IX.B. Consequently, the scienter requirement does not make the Preemption Law constitutional.

B. The Ability to Seek Nonbinding Advisory Opinions and Declaratory Judgments Does Not Render the Statute Constitutional.

Defendants argue that if Plaintiffs are unsure as to the application of the Preemption Law, they can ask the Attorney General for a nonbinding advisory opinion or the courts for a declaratory judgment. *See* Def. MSJ at 23–24. Aside from the irony of that argument on the heels of Defendants' motion to dismiss ("MTD"), this is no answer to a criticism of vagueness. It is the

[20] Moreover, the Attorney General has admitted that the Preemption Law's scienter requirement may not even shield officials who have made a good faith effort by relying on counsel's advice to comply with the Law. 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 Cir. Ct. Sept. 8, 2015).

[21] While Defendants are dismissive of this interpretation, the language in sections 790.33(3)(b) and (c) certainly reflects the possibility that a reviewing court could conclude that the *local government's* enactment was knowing and willful and that, therefore, all elected officials under whose jurisdiction the ordinance was enacted or enforced should be fined. Nowhere in section 790.33(3) is there a requirement that a court specifically determine that the *individual* officials knowingly and willfully violated the preemption.

statute, not the other branches of government, that must "apprise those to whom it applies what conduct on their part is prohibited." *Wershow*, 343 So. 2d at 608–09.

Moreover, there is no guarantee that the Attorney General will even address Plaintiffs' concerns because the Attorney General is not *required* to issue opinions requested by Plaintiffs, as opposed to other state officials. *See* § 16.01(3), Fla. Stat. And the opinions she *does* issue are nonbinding, as Defendants concede, Def. MSJ at 23, and do not prevent a subsequent attorney general—or indeed the same attorney general—from attempting to enforce the Penalty Provisions.

Additionally, the Attorney General's opinion that a particular proposed action would not violate the Preemption Law provides no real assurance that a court adjudicating a claim under section 790.33 would agree. For example, the Legislature, and now Defendants, have taken the position that the City of South Miami's ordinance declared invalid in *National Rifle Association of America v. City of South Miami*, 812 So. 2d 504 (Fla. 3d DCA 2002), was a *clearly* preempted ordinance. *See* Def. MSJ at 5 ("Under any reading of the Act, the [*South Miami*] ordinance was a preempted 'regulation of firearms.'"). However, Defendants conveniently ignore the fact that prior to that decision, the Attorney General, at the request of the City of South Miami, expressly opined that the ordinance was *not* preempted. *See Honorable John Grant*, Fla. AGO 2000-42, 2000 WL 972870, at *2 (July 11, 2000) ("A requirement that gun owners secure their firearms with a gun lock would not appear to interfere with that right. Nor does the existence of statutes requiring that firearms be secured necessarily preclude a municipality from adopting a more stringent standard."). Thus, as illustrated in the *City of South Miami* case, the mere possibility of obtaining a non-binding, advisory opinion from the Attorney General does nothing to clarify the law.

As to the availability of declaratory relief, Defendants point to the Plaintiffs' declaratory judgment counts as a solution to the problem. Def. MSJ at 23–24. Yet, in the very same motion, Defendants argue that declaratory relief is unavailable. Def. MSJ at 61–62; *see also* Gov. MSJ at

3–7. Although Defendants are mistaken in that regard, the availability of such relief does not ameliorate the Preemption Law's vagueness. The Legislature may not simply pass the buck to the already-over-worked courts to essentially rewrite the Preemption Law in order to cure the law's vagueness. *See Whitaker v. Dep't of Ins. & Treasurer*, 680 So. 2d 528, 531 (Fla. 1st DCA 1996) (stating 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"); *see also* Pl. MSJ at 41.

In short, the fact that the other branches of governments can, under certain circumstances, attempt to explain the vague law does not satisfy the fundamental requirements of due process.

C. Defendants' Attempt to Clarify the Statute Only Reinforces Its Vague Nature.

Defendants spend the bulk of their vagueness argument attempting to explain away the incoherent distinction section 790.33 makes between the terms *ordinance*, *rule*, and *regulation* (§ 790.33(3)(a), Florida Statutes) and the terms *measure*, *directive*, *enactment, order*, and *policy* (§ 790.33(3)(f), Florida Statutes). Defendants' efforts to explain away the different terms only highlight the Preemption Law's vagueness.

Defendants state that the Preemption Law prohibits a local government's regulation of "firearms and ammunition" (something Plaintiffs do not dispute), but then insist, without citation, that the terms *measure, directive, enactment, order*, and *policy* are simply subparts of "regulation." Def. MSJ at 14. However, as explained below, these are not synonymous terms. *See Snow v. Ruden McClosky, Smith, Schuster & Russell, P.A.*, 896 So. 2d 787, 790–91 (Fla. 2d DCA 2005) ("Each of these terms—statute, ordinance, rule, and regulation—and their meanings are well known to the legislature. '[T]he legislature is presumed to know the meaning of the words it utilizes and to convey its intent by use of specific terms.'" (citation omitted and alteration in original)).

A policy is simply "a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body." Policy, *Merriam-Webster Dictionary* (last visited

April 3, 2019) (available at https://www.merriam-webster.com/dictionary/policy). Similarly, measures and directives are something *less* than a regulation. *See, e.g.*, § 337.19(1), Fla. Stat. (referencing "directives" issued by an executive agency); § 341.071, Fla. Stat. (providing for performance measures established by local governments). By contrast, a regulation is "a rule or order issued by an executive authority or regulatory agency of a government and having the force of law." Regulation, *Merriam-Webster Dictionary* (last visited April 3, 2019) (available at https://www.merriam-webster.com/dictionary/regulation). Thus, for example, a local government can have a general *policy* not to do business with firearm-related business without violating the Preemption Law by *regulating* those businesses. In Defendants' view, all of these terms are included in the overarching ban on "regulations." Def. MSJ at 14–15. However, as written, local governments cannot decipher what is prohibited due to the vagueness of the Preemption Law.

Further confusing the issue, Defendants correctly admit that local governments can act as proprietors and refuse to lease government-owned property to firearm-related business, but Defendants call the exclusion of firearms from government-owned property a *regulation*. Def. MSJ at 55–56. No regulation is involved when acting in a proprietary capacity. *See infra* at Part IX.B. Indeed, "one of the main rights attaching to [owning] property is the *right to exclude others*." *See Rodriguez v. State*, 468 So. 2d 312, 315 (Fla. 1st DCA 1985) (quoting W. Blackstone, Commentaries, Book 2, ch. 1). The exclusion of firearms from government-owned facilities is one of the things the County and Municipal Plaintiffs have contemplated doing. *See* Pl. MSJ at 46–48. However, the Plaintiffs cannot determine whether the Preemption Law prohibits local governments from excluding firearms from their own property. *Id.*

Other examples of the lack of clarity pervade the Preemption Law. While Defendants wrongfully insist that certain regulatory provisions that the Plaintiffs wish to enact are preempted, *see infra* Part I.X, Defendants fail to address whether the many other legislative and regulatory

actions Plaintiffs wish to take are preempted (and if so, why). *See* SOF ¶¶ 10–13; Pl. MSJ at 40–41. To the extent Defendants argue that Plaintiffs' proposed actions are preempted, their arguments lack reason and legal basis.

For example, Defendants contend that although the text of the Preemption Law does not mention "accessories," the law nevertheless still preempts local governments from regulating items other than "firearms, ammunition, or components," including "accessories," because the purpose of such a regulation relates to how firearms and ammunition are used and possessed. Under Defendants' reading of the Preemption Law, an ordinance prohibiting a particular accessory—such as a separately sold magazine that attaches to a firearm, which a number of Plaintiffs wish to enact—may be preempted. *See* SOF ¶¶ 5(c), 10(a), 12 (a)). However, Defendants' argument ignores the longstanding legal principle that "[e]xpress preemption requires a specific legislative statement; it cannot be implied or inferred." *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010). Thus, because the statute does not preempt the regulation of anything other than firearms and ammunition, such as the regulation of "accessories," any such ordinance should not be preempted. *See* Pl. MSJ at 46–48.

Equally unclear is whether the Law's preemption of "firearms, ammunition and components" covers "bump stocks"—devices that attach to semi-automatic firearms to enable continuous firing—that some Plaintiffs wish to outlaw. SOF ¶ 12. The proper categorization of bump stocks has been disputed at the federal level. The Federal Bureau of Alcohol, Firearms, Tobacco and Explosives ("ATF"), for example, had previously determined that bump stocks did not convert a semi-automatic firearm into a machine gun and, thus, were "accessories" outside of the agency's regulatory authority. *See Bump-Stock-Type Devices*, 83 Fed. Reg. 66514 at 66530, 66545 (Dec. 26, 2018). Recently, however, the ATF reversed its position, now classifying bump stocks as devices that convert semi-automatic firearms into machineguns, thereby making them

illegal to manufacture and possess. *Id.* at 66514. Gun rights organizations sued to enjoin the new regulation, arguing that bump stocks are accessories, but the ATF rule was ultimately upheld in federal court, with the Supreme Court denying a stay. *See Gun Owners of Am., Inc. v Whitaker*, 1:18-cv-01429 (Dec. 26, 2018), *den. mot. to stay, Gun Owners of Am., Inc. v. Barr*, No. 18A963, 2019 WL 1389370, at *1 (U.S. Mar. 28, 2019).

As the National Rifle Association points out in this case, the vagueness of the Preemption Law is, in fact, the purpose of the statute. *See* NRA Am. Br. at 6 ("[E]ven assuming that it is unclear whether Plaintiffs' proposed ordinances would be preempted, their hesitation to enact the ordinances is precisely the virtue of the penalty provisions." (emphasis in original)). While it may serve the interests of legislators eager to discourage local firearms regulations to preempt a broad, but poorly-defined swath of activity, the convenience of such legislation does not excuse the violation of due process. Plaintiffs are entitled to reasonable notice as to what behavior is prohibited by legislation, and the Preemption Law fails to provide it.

VI. THE PENALTY PROVISIONS UNCONSTITUTIONALLY IMPAIR ANTECEDENT CONTRACTS.

To find that a statute impairs a contract in violation of the Florida Constitution, "[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." *Sears, Roebuck & Co. v. Forbes/Cohen Fla. Props, L.P.*, 223 So. 3d 292, 299 (Fla. 4th DCA 2017). As applied to antecedent contracts such as those between Broward County and Leon County and their respective County Administrators, section 790.33(3) substantially alters the contractual terms without serving a substantial public purpose that overcomes the general prohibition against

intruding into private contractual relationships.[22]

The contract clause prohibits any "law impairing the obligation of contracts." Art. I, § 10, Fla. Const. The Florida Supreme Court has defined "impairment" to be "to make worse; to diminish in quantity, value, excellency, or strength; to lessen in power; to weaken." *State ex rel. Woman's Benefit Ass'n v. Port of Palm Beach Dist.*, 164 So. 851, 856 (1935) (emphasis omitted). "Whatever legislation lessens the efficacy of the means of enforcement of the obligation is an impairment. Also if it tends to postpone or retard the enforcement of the contract, it is an impairment." *Id.* As the Florida Supreme Court has repeatedly stated, "This Court has generally prohibited all forms of contract impairment." *State, Dep't of Transp. v. Edward M. Chadbourne, Inc.*, 382 So. 2d 293, 297 (Fla. 1980); *Citrus Cty. Hosp. Bd. v. Citrus Mem'l Health Found., Inc.*, 150 So. 3d 1102, 1108 (Fla. 2014).

As a threshold issue, Defendants assert that the claim of unconstitutional impairment cannot be brought unless and until the County Administrator is removed by the Governor. Def. MSJ at 44. Defendants already unsuccessfully raised this issue in their Motion to Dismiss. *See* Def. MTD at 8–13. Because this Court denied Defendants' Motion to Dismiss, Plaintiffs are entitled to a declaration of their rights.[23] *See* Pl. MSJ at 7.

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[22] This claim is asserted in Count II of the *Counties* Compl. Leon County has joined in Count II of the *Counties* Complaint and, as more fully set forth in Section VII of Plaintiffs' Motion, also asserts that section 790.33(3) unconstitutionally impairs the June 10, 2011 Employment Contract between Leon County and its employee, Vincent S. Long, the Leon County Administrator ("Leon Contract"). The substance of both Plaintiffs' and Defendants' arguments in their respective Motions are equally applicable to both Broward County and Leon County.

[23] Moreover, the only authority Defendants cite is *State v. Fla. Consumer Action Network*, 830 So. 2d 148, 152 (Fla. 1st DCA 2002). That decision is inapplicable. There, the plaintiff sued the state regarding a tort law, but Plaintiffs "failed to identify how any particular provision in chapter 99-225 would directly affect or harm them. Nor did plaintiffs dispute the meaning or impact of any individual provision or law; they apparently only want the laws struck, because they oppose their substantive content. The sole doubt they expressed was whether they have to obey the laws that they contend affect them, because, in their opinion, the legislation is unconstitutional." 830 So. 2d

Broward County and Leon County allege that the Penalty Provisions unconstitutionally impair the following terms of their contracts: (i) that the County Administrators "serve[] at the pleasure" of their respective Boards of County Commissioners, SOF Ex. 8 at Exh. B ("Broward Contract") at § 2.3; SOF Ex. 10 at Exh. B ("Leon Contract") at §5(A); and (ii) the contractual obligations of Broward County and Leon County to defend and indemnify their respective County Administrators, Broward Contract at § 14.1; Leon Contract at § 4(b). Broward County further alleges that removal of Ms. Henry by the Governor would obligate it to pay severance benefits despite the fact that Broward County did not terminate her employment. *Counties* Compl. ¶ 77.

In their Motion, Defendants offer three false gambits. First, Defendants attempt to sidestep the issue by pointing to the Broward County Administrative Code and arguing it must yield to the statute. The discussion is irrelevant: the claim is for impairment of contract, not for impairment of administrative code.[24] Second, Defendants seek to impose the standard for a facial challenge. Def. MSJ at 44–45. This is not a facial challenge, but rather as applied, so the higher standard does not apply. *Counties* Compl. ¶ 81. Third, Defendants contend that the Counties cannot "limit the current or future power of the Governor, who is not a party to the contract." Def. MSJ at 46. This argument misstates the basis of the Counties' claim: the claim does not rest upon the contractual power of

at 153. The Counties, however, *have* shown how the abridgment of their contract harms them – an impairment of contract in and of itself "diminishes in quantity, value, excellency or strength" the Counties' contract with their administrators. *See Pomponio v. Claridge of Pompano Condo., Inc.*, 378 So. 2d 774, 780 (Fla. 1979). The impairment, by its very existence, "chang[es] the substantive rights of the parties to an existing contracts." *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1190-91 (Fla. 2017). In short, Broward and Leon County are harmed because it places them in a separate legal position with respect to their respective county administrators – a legal position they did not bargain for and that devalues the substantial consideration exchanged between the parties.

[24] The Counties do not contend that the Legislature cannot override a local administrative code, and cited to the Administrative Code in the *Counties* Complaint merely to show that indemnification was intended and is not aberrational. *Counties* Compl. ¶ 79.

the Counties to bind the Governor, but rather upon the constitutional prohibition on impairment of contracts by the Legislature. The Counties cannot, and do not seek to, limit the power of the Governor, but the Legislature cannot impair the contracts of the Counties, as protected by the Florida and United States Constitutions. Art. 1, § 10, U.S. Const.; Art. 1, § 10, Fla. Const.

Otherwise, Defendants make two arguments: there is no impairment; and if there is an impairment, it is reasonable and necessary. Def. MSJ at 46–49. Defendants first argue that because the County Administrator can resign, the contractual provisions that the Board may retain the County Administrator "at its pleasure" are illusory and therefore no contract rights are actually impaired. Def. MSJ at 46–47. Defendants miss the point: under the contractual relationship, only the County Administrator or the Board can terminate the relationship; by contrast, section 790.33(3)(e) interjects a third-party with the unilateral right to fundamentally alter the contractual relationship, which is the very definition of an unconstitutional impairment. The very plain effect of section 790.33(3)(e) is that if the County Administrator acts *as directed by the Board* and the Governor deems that action to be a knowing and willful violation of the Preemption Law, the Governor can remove the County Administrator notwithstanding the Counties' contracts. As such, section 790.33(3)(e) unconstitutionally impairs the contacts at issue.

Defendants similarly contend that the Counties would not be obligated to pay severance benefits if the Governor removed the County Administrators "for cause." Again, the Penalty Provisions literally rewrite the contract and permit the removal of the County Administrator by the Governor for acting *as directed* by the Board (i.e., "without cause") and would thus require the Board provide severance benefits to the County Administrator contrary to the clear intent of the contract. Similarly, Defendants' argument that violating the Preemption Law is sufficient "cause" for removal requires a rewriting of the contracts to define "for cause" as anything that the Boards ***or the Governor*** finds as sufficient grounds for termination.

Finally, Defendants' argument that the indemnification obligation is somehow annulled because section 790.33(3)(d) "precludes by law" the reimbursement or defense of individuals who knowingly and willfully violate the Preemption Law is a gross distortion of the contract. The Broward contact actually states that "even though [the County] may proceed to handle a claim, action, or demand against ADMINISTRATOR," certain *claims* may be precluded by law or not covered by the indemnification provision, in which event the County may seek reimbursement. *See* Broward Contract, § 14.1. For example, a lawsuit that asserted wrongful action in both professional and personal capacities would clearly not be covered as to the personal capacity claim.[25] The right to deny a defense for uncovered claims is a far cry from agreeing that the contractual obligations of the parties may be wholly overridden by the Legislature at its whim.[26]

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[25] The reservation of the right of the County to deny a defense is part of the same sentence, and clearly not a standalone right to deny any and every defense, which would render the provision illusory. Defendants cite no Florida authority for the proposition that standard contractual provisions that prohibit performance if "precluded by law" are intended to address anything other than *laws in effect at the time of the making of the contract.* Rather, Defendants' cases stand merely for the proposition that a state law did not impair a contract when the contract expressly stated that its terms were subject to legislative regulation. *City of Charleston v. Public Service Comm'n of West Virginia*, 57 F.3d 385 (4th Cir. 1995); *Transp. Workers Union of Am. Local 290 By & Through Fabio v. Se. Penn. Trans. Auth.*, 145 F.3d 619 (3d Cir. 1998). Defendants' argument goes well beyond those cases to effectively contend that any contract that is expressly subject to Florida law could never be impaired. This is an absurd result and is contrary to the law of impairment of contracts. *See* PMSJ at 42-43. Moreover, the Florida Constitution offers greater protection for rights derived from the Contract Clause than the United States Constitution. PMSJ at 42. Further, in *City of Charleston*, one of the factors the Fourth Circuit considered was that there was a "long established precedent of extensive state regulation of public utilities" that would not have been foreseen by the drafters of the contract at issue. 57 F.3d at 394. The Penalty Provisions of Section 790.33, Fla. Stat. were an unprecedented step by the Florida Legislature that could not have been reasonably anticipated.

[26] Defendants cite to *City of Charleston*, 57 F.3d 385, and *Transportation Workers Union*, 145 F.3d 419, for the proposition that a state law did not impair a contract when the contract expressly stated that its terms were subject to legislative regulation. As more fully argued in Plaintiffs' Motion, the Florida Constitution offers greater protection for rights derived from the Contract Clause than the United States Constitution. PMSJ at 42. Further, in the Fourth Circuit's analysis of the public contract in *City of Charleston*, one of the factors considered was the "long established precedent of extensive state regulation of public utilities" that would not have been unforeseen by

Next, Defendants argue that the impairment of rights is *de minimis*. Def. MSJ at 49. Florida law clearly establishes that "virtually no degree of contract impairment is tolerable." *See Searcy*, 209 So. 3d at 1191 (quotations omitted). Fundamental to the contracts at issue is the obligation of the County Administrators to carry out the directives of their respective boards. Neither Broward County nor Leon County bargained for the elimination of the ability to direct their County Administrators. The Penalty Provisions destroy these contracted-for relationships, effectively rewriting those 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).

Finally, Defendants contend that the substantial impairment serves the "important public purpose" of ensuring uniform statewide firearm regulations. This is flawed logic. As discussed in Plaintiffs' motion, the Penalty Provisions are unnecessary to prevent local public employees from enforcing preempted ordinances or regulations. *See* Pl. MSJ at 23–28; *see also Sears, Roebuck & Co.*, 223 So. 3d at 300 (finding a city's impairment of contract was unnecessary when existing land use regulations already accomplished the city's purported public purpose).

Broward County and Leon County are entitled to a declaration that the Penalty Provisions constitute an unconstitutional impairment of their respective contracts.

VII. THE PENALTY PROVISIONS VIOLATE THE DOCTRINE OF SEPARATION OF POWERS BY USURPING THE ROLE OF THE JUDICIARY.

Defendants erroneously contend that section 790.33(3)(b) does not usurp the constitutional authority of the courts by mandating that a court issue an injunction if a violation is found. Def. MSJ at 53–54. Longstanding Florida Supreme Court authority countermands Defendants'

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the drafters of the contract at issue. 57 F.3d at 394. The Penalty Provisions of section 790.33 were an unprecedented step by the Legislature, and therefore the analogy is inapt.

argument: "the Legislature is without authority to mandate a court of equity to issue an injunction." *Rich v. Ryals*, 212 So. 2d 641, 643 (Fla. 1968); *Walker v. Bentley*, 660 So. 2d 313, 320 (Fla. 2d DCA 1995), *approved*, 678 So. 2d 1265 (Fla. 1996) ("Such a restriction, if given mandatory effect, would constitute an unconstitutional infringement on a court's inherent power."); *see also Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991) (articulating the divide between "matters of substantive law, which is within the legislature's domain" and "matters of practice and procedure, which this Court has the exclusive authority to regulate."). If, as Defendants contend, the Legislature has "provide[d] explicitly that the remedy of vindication shall be an injunction" which must be issued, Def. MSJ at 53, then section 790.33(3)(b) is necessarily unconstitutional.[27]

To rebut the Supreme Court's pronouncement in *Ryals*, Defendants offer only *dicta* from a Fourth District Court of Appeal case, *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191 (Fla. 4th DCA 2001). However, *Pinecrest Lakes* actually addressed whether the trial court failed to balance the equities in ordering a sweeping mandatory injunction, not whether the trial court was required to issue an injunction. *Id.* at 209 (holding that the challenged injunction was valid).[28] Moreover, even the *Pinecrest Lakes* court recognized that its *dicta* conflicted with authority in the Second and Third District Courts of Appeal. *See id.* at 205; *cf. Times Publ'g Co. v. Williams*, 222 So. 2d 470, 478 (Fla. 2d DCA 1969) (holding that if statutes "purport to dictate to such courts when, how

[27] Alternately, if Defendants seek to save the constitutionality of the provision, they should concede that "shall" must be read as "may," in which event Plaintiffs are entitled to a declaratory judgment that the injunction is not mandatory. *Rich v. Ryals*, 212 So. 2d at 643 (construing "shall" to mean "may" and stating that "[i]t has long been the policy of this court in the interpretation of statutes where possible to make such an interpretation as would enable the court to hold the statute constitutional").

[28] The statute at issue merely stated that "[a]ny aggrieved or adversely affected party may maintain a de novo action for declaratory, injunctive, or other relief . . . ." § 163.3215(1), Fla. Stat. The constitutionality of a statute requiring the courts to issue an injunction was not at issue in *Pinecrest Lakes* – nor could it have been, as the challenged statute did not dictate a particular remedy but permitted an action for "declaratory, injunctive, or other relief." *Id*.

or under what conditions injunctions should issue they would constitute an unlawful legislative infringement on a judicial function") (overruled in part on other grounds); *Harvey v. Wittenberg*, 384 So. 2d 940, 941 (Fla. 3d DCA 1980) (citing *Times Publishing* with approval); *see also Counties* Compl. ¶¶ 92–95.

Defendants' remaining arguments are not on point. Def. MSJ at 54. Plaintiffs do not dispute that the Legislature has the authority to create a statutory cause of action, and are not asking the Court to "'willy nilly' strike down legislative enactments and abrogate the rights granted under statutes and common law." *Computech Int'l v. Milan Commerce Park, Ltd.*, 753 So. 2d 1219, 1222 (Fla. 1999), *receded from on other grounds*, *Tiara Condo. Ass'n, Inc. v. Marsh & McLennan Cos.*, 110 So. 3d 399, 407 (Fla. 2013). However, the power to create a cause of action does not include the power to dictate that a co-equal branch of government grant a specific equitable remedy. Therefore, the Penalty Provisions' required injunction provision should be declared unconstitutional.

VIII. THE PENALTY PROVISIONS ARE ARBITRARY AND IRRATIONAL.

In defending the Preemption Law's arbitrary and irrational exaction of penalties, Defendants argue that they have a "legitimate interest in achieving statewide uniformity in the regulation of firearms and ammunition." Def. MSJ at 31. Although statewide uniformity is the purpose of every preemption statute, the Penalty Provisions punish a violation of the Preemption Law differently and much more harshly than parallel preemption laws; this irrational distinction violates substantive due process principles. To pass constitutional muster, it is not enough that a statute has a legitimate purpose; it must also bear a reasonable relationship to that stated purpose. *Estate of McCall v. United States*, 134 So. 3d 894, 900–01 (Fla. 2014) ("To satisfy the rational basis test, a statute must bear a rational and reasonable relationship to a legitimate state objective, and it cannot be arbitrary or capriciously imposed."); *Goodman v. Martin Cty. Health Dep't*, 786

So. 2d 661, 664 (Fla. 4th DCA 2001) ("A statue that is vague, arbitrary, or capricious and bears no reasonable relationship to a legitimate legislative intent is unconstitutional.").

The Penalty Provisions bear no reasonable relationship to their purpose of uniformity. Other preemption statutes cover the same areas but do not penalize local governments and elected officials in the same order of magnitude as do the Penalty Provisions. For example, the legislative preemption for local regulation of structural design, construction, and demolition—which similarly address issues of public safety and citizens' constitutional rights—does not impose the strict and punitive consequences of the Penalty Provisions.[29] *See* § 553.72(1), Fla. Stat. ("The Florida Building Code shall establish minimum standards primarily for public health and lifesafety, and secondarily for protection of property as appropriate."); Art. 1, § 2 Fla. Const. ("All natural persons . . . have inalienable rights, among which are the right to . . . acquire, possess and protect property.").

Defendants also argue that the penalties bear a rational relationship to Defendants' need to deter local governments from continuing to violate the Preemption Law. Def. MSJ at 31. This argument misses the mark. As noted in the Plaintiffs' Motion for Summary Judgment, the Preemption Law was already accomplishing its goals without the need for the addition of the harsh penalties. *See* Pl. MSJ at 26–27. Moreover, the ready cure for any local governments that venture too far into the area of preemption is commencement of legal proceedings to obtain a judicial declaration and injunction—a process that Florida law already provides. But because of the Penalty Provisions within the Preemption Law, local governments and their elected officials are threatened

[29] Like the Preemption Law and all preemption statutes, the preemption on building codes also has the same stated purpose of uniformity. § 553.72(1), Fla. Stat. ("The purpose and intent of this act is to provide a mechanism for the uniform adoption, updating, amendment, interpretation, and enforcement of a single, unified state building code…").

with undue and unfair penalties. There is no rational basis for the disparate treatment between the harsh penalties of the Preemption Law and other preemption statutes.

The Penalty Provisions also violate due process because they apply to conduct that is perfectly permissible. *See, e.g., State v. Saiez*, 489 So. 2d 1125, 1129 (Fla. 1986) (finding a violation of substantive due process where a statute "criminalizes activity that is otherwise inherently innocent"); *Robinson v. State*, 393 So. 2d 1076 (Fla. 1980) (striking down a penal statute that could be applied to entirely innocent activities). Like the penal statutes in *Saiez* and *Robinson*,[30] the Penalty Provisions would penalize an elected official for *complying* with Florida law by voting *against* a preempted ordinance.[31] *See* Pl. MSJ at 39 n.20. Therefore, the statute violates substantive due process. *See also supra* Part III.

In response to Count VI of the *Weston* Complaint, Defendants also insist that the Preemption Law does not violate equal protection because public entities are different from private ones. Def. MSJ at 32. That claim, however, is not based upon a violation of the equal protection clause. It is based upon the undeniable principle that the Legislature's authority to pass laws is not unlimited and unchecked—it may only be exercised in valid and proper manner, and it cannot be exercised arbitrarily, capriciously or irrationally. *See Rogers v. Brockette*, 588 F.2d 1057, 1068

[30] The Preemption Law is analogous to the criminal statutes in *Saiez* and *Robinson* because the Preemption Law is a penal statute which imposes punitive measures. Penal statutes may be 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); *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).

[31] 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.

(5th Cir. 1979) (indicating that states do not have the "plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations"). The language "except as otherwise provide by law" found in article VIII, section 2(b) of the Florida Constitution must be interpreted to apply only to "valid" exercises of the State's legislative power. The legislature cannot simply pass any law—regardless of its procedural or substantive defects—and have it be unchallengeable. That violates the voters' intent to give municipalities broad home rule powers, as well as the basic tenets of checks and balances and separation of powers inherent in American democracy. *See Town of Riviera Beach v. State*, 53 So. 2d 828, 831 (Fla. 1951) ("Where the law or charter confer upon the city council, or local legislature, power to determine upon the expediency or necessity of measures relating to local government their judgment upon the matters thus committed to them while acting within the scope of their authority cannot be controlled by the courts.").

Nevertheless, Defendants concede the unique position of local governments as property owners and their ability to preclude firearms and ammunition in their proprietary capacity. Def. MSJ at 55. Yet, by attempting to distinguish public entities from private ones, Defendants contend without basis or citation that local governments and private citizens are not similarly situated and thus ignore the factual similarities between commercial property owned by private entities and those owned by local governments. There is no applicable distinction. *See Daniels v. O'Connor*, 243 So. 2d 144 (Fla. 1971) (when the difference between those included in a class and those excluded from it bears no substantial relationship to the legislative purpose, the classification denies equal protection under the law). When local governments perform functions outside of their capacity as regulators, they act as market participants, 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). Like private property owners, public property owners should be able to restrict firearms from their properties. *See Hamler v. City of Jacksonville*, 122 So. 220, 221 (Fla. 1929) (holding that the municipality was "acting in its proprietary corporate capacity as distinguished from its governmental capacity" and therefore "the court should not interfere with the reasonable discretion of the properly constituted officers or authorities in the operation of such venture"); *City of Winter Park v. Montesi*, 448 So. 2d 1242, 1245 (Fla. 5th DCA 1984) ("When a municipality operates in its proprietary capacity, it is governed by the same laws and may exercise the same rights as a private corporation engaged in a similar undertaking.").

IX. THE PLAINTIFFS ARE ENTITLED TO DECLARATORY JUDGMENT THAT CERTAIN PROPOSED REGULATIONS ARE PERMISSIBLE.

A. The Counties May Enact Regulations to Enforce the Local Option (*Counties* Compl., Count VII).

As more fully argued in Plaintiffs' Motion for Summary Judgment, the Counties may enact regulations to enforce the Local Option, and that authority cannot be abridged by the Legislature. *See* Pl. MSJ at 45–46. Defendants concede the proposed non-legislative measures fall outside the purview of the Preemption Law, agreeing that "to enforce [the Local Option], *counties must be free to require sellers to prove their compliance*." Def. MSJ at 59 (emphasis added). Of the six examples of permissible action identified in Count VII, Defendants concede that the proposed *non*-legislative action is permissible and not preempted, namely: posting signs, providing written notice, and informing gun show staff of the requirements. Def. MSJ at 60; *Counties* Compl. ¶ 139(c) and (e). As such, the Counties are entitled to a declaratory judgment in their favor on these and any other *non*-legislative action taken to enforce the Local Option.

Of the remaining examples of legislative actions, Defendants curiously pick *one* legislative act as permissible because it is "strictly necessary" to enforce the Local Option and decry the other proposed acts as "unnecessary" in light of the passage of the first legislative act. Def. MSJ at 58. The Counties agree with the Defendants that requiring sellers to keep "documentation of the date and hour of the firearm sale, the date and hour of the firearm transfer or receipt, the unique approval number obtained from the inquiry to the Department of Law Enforcement, and the serial number of the firearms at issue," *Counties* Compl. ¶ 139(a), is permissible, and request the Court grant declaratory judgment on this issue.

However, Defendants' argument that the remaining proposed legislative actions are "illegal because they are not strictly necessary to enforce the [Local Option]," Def. MSJ at 60, defies both law and logic. The Local Option is not some fly-by-night piece of legislation that may be blithely overridden by the Preemption Law: it is firmly fixed in the Constitution. The Legislature cannot abridge the Counties' constitutional Local Option power by statute.[32] *See State ex rel. Buckwalter v. City of Lakeland*, 150 So. 508, 512 (Fla. 1933) ("It may be said as a general rule that whatever power is conferred upon the courts by the Constitution cannot be enlarged or abridged by the Legislature."); *Brinson v. Tharin*, 99 Fla. 696, 702 (1930) (holding that a "power [] secured by the Constitution . . . may not be extended, limited, nor regulated by statute").

Without the ability to enact regulations or ordinances to enforce the Local Option, the constitutional provision would be wholly illusory. Under well-established law, constitutional

[32] Notably, in agreeing that the Counties may enact legislation that is permitted by the Local Option, Defendants argue the "converse" is also true—"to the extent such requirements exceed what is expressly allowed by Article VIII, Section 5(b), they are in violation of Section 790.33," Def. MSJ at 59, n.17—and thus concede their own illogic. The truth of a proposition does not imply the truth of the "converse." *Drabkin v. D.C.*, 824 F.2d 1102, 1119 (D.C. Cir. 1987) (Ginsburg, J., dissenting) (stating the argument is "incorrect as a matter of logic, for a truthful proposition does not imply the truth of its converse").

provisions should never be construed to defeat their clear purpose and intent. *See Zingale v. Powell*, 885 So. 2d 277, 282 (Fla. 2004) (affirming that a constitutional provision "must be construed or interpreted in such manner as to fulfill the intent of the people, never to defeat it. Such a provision must never be construed in such manner as to make it possible for the will of the people to be frustrated or denied" (*quoting Zingale v. Powell*, 885 So. 2d 277, 282 (Fla. 2004))).

Statutory provisions that relate to the same subject must be read together and construed consistently to give meaning to all such provisions. *See Forsythe v. Longboat Key Beach Erosion Control Dist*., 604 So. 2d 452, 455 (Fla. 1992) ("Where possible, courts must give full effect to *all* statutory provisions and construe related statutory provisions in harmony with one another."). In the instant matter, the preemption provisions must be construed consistently with the Local Option provision and the requirement that the Counties "enforce state firearms laws."

For example, consider the Counties' proposed action of requiring completion of a criminal history records check prior to the purchase of firearms from any licensed importer, licensed manufacturer, or licensed dealer, regardless of the location of the sale. *Counties* Compl. ¶ 139(b). This requirement is contained within section 790.0655 (miscited in the *Counties* Complaint as section 790.065), which generally forbids delivery of a firearm to an individual prior to the completion of the latter of the waiting period or the completion of the criminal history records check. Section 790.0655 applies to *all* firearm sales by retailers and—unlike the Local Option—is not limited to sales "conducted on property to which the public has the right of access." § 790.0655(1)(a), Fla. Stat. Defendants acknowledge that the Counties "are not only free but indeed *required* to enforce the State's criminal laws." Def. MSJ at 56; *see* § 790.33(2)(a), Flat. Stat. ("requir[ing] local jurisdictions to enforce state firearms laws"). Nonetheless, Defendants argue that the Counties' proposed actions (which enforce the state firearms law and exercise the

Local Option authority) are somehow preempted. This argument is contrary to basic rules of statutory construction.

In contrast to these clear-cut principles of construction, Defendants offer their self-created "strictly necessary" standard. Defendants fail to cite any authority for the proposed standard, nor could they: there is no such standard. Def. MSJ at 59.

Nor do Defendants cite any legal support for their logical leap that Counties may only take ***one*** legislative action to enforce the Local Option, and once taken, all further action is precluded. This "one bite at the apple" theory has no basis in law or the Constitution. Nothing in article VIII, section 5 states that counties get only one shot at exercising their constitutional authority. Indeed, the argument defies logic: who is to say that one county would not seek to enact these other proposed actions as their "first" action, which would thus be—for that county—"strictly necessary" under the Defendants' theory. With 67 counties in Florida, Defendants' theory would hold that *any* one of the 67 actions is permissible so long as it is the first and only action taken by the respective county. This is illogical and unsupportable.

Finally, Defendants appear to misunderstand section 790.335. It does not prohibit requiring sellers to "maintain verifiable documentation of their compliance" with the waiting period of background check (as would be necessary to actually enforce the Local Option or section 790.0655). Def. MSJ at 60. Rather, it prohibits only two things: lists of privately owned firearms, and lists of firearm owners. Nothing in section 790.335 prohibits lists of firearm *transactions* that do not list the firearm or the owner, such as the proposed lists of the date and time of purchase and transfer, the unique identified number from the background check, etc.[33]

[33] Even more curious, Defendants cite to section 790.335(3)(e) as the supposed prohibition on requiring documentation of compliance. This subsection contains *exceptions* to the prohibitions on lists and records and does not add any new prohibited list to the statute.

Accordingly, the Counties are entitled to a declaration that they are authorized to take both legislative and non-legislative actions to enforce the Local Option, including the examples discussed, and that such enforcement actions are outside the scope of the Preemption Law.

B. The Counties and Municipalities May Act in a Proprietary Capacity to Address Firearms and Ammunition (*Counties* Compl., Count VIII; *Weston* Compl., Count VI)

Defendants' Motion concedes that "actions taken in a purely *proprietary* capacity, such as leasing (or declining to lease) county-owned properties or facilities to a particular individual or business . . . fall outside the statute's ambit." *See* Def. MSJ at 55 (emphasis added). The Counties and municipalities agree, and respectfully request that the Court enter an order finding the same. However, in nearly the same breath as the acknowledgement that actions taken in a "proprietary capacity" are outside of the scope of the Preemption Law, Defendants also take the wholly inconsistent position that some proprietary actions (such as restricting firearms or ammunition from being brought onto one's property) are, in fact, regulatory, and therefore preempted. Def. MSJ at 55–56.

What remains unclear from Defendants' concession is how their arbitrary distinction between what they acknowledge is proprietary and what they claim is regulatory plays out in real life. Defendants concede that declining to lease government-owned properties or facilities to a particular industry, such as gun shows, are not "regulations" within the statute's ambit; but at the same time argue that "directives" and "policies" exercising those proprietary rights relating to guns or ammunition are regulations and fall within the statute's realm. *Compare* DMSJ at 54 *with* Def. MSJ at 14. Under Defendants' reading, there is no way for a local government to exercise its proprietary authority and direct staff to carry out that authority. This is directly contrary to the United States Supreme Court's finding that "where analogous private conduct would be permitted," the Court should not infer the statute prevents such proprietary action unless the statute

indicates that the government may not manage its own property when it pursues its proprietary interests (an exception that is clearly not at issue). *Bldg. & Constr. Trades Council*, 507 U.S. at 231. A private business in Florida may direct its employees not to permit individuals carrying guns into its establishment; but, under Defendants' reading, local governments could not do the same, as that would be a "directive," albeit in the government's proprietary capacity. Here, the local governments simply seek to be able to exercise their proprietary rights by directing staff through policies, rules, directives, and the like in the management of their private property, as private citizens and businesses are permitted to do. Plaintiffs thus respectfully request that the Court enter an order declaring that the statute permits the local governments to do so.

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

Defendants concede that section 790.06(12)(a) provides a list of exceptions to the lawful carry of a concealed firearm. Def. MSJ at 56. The unlawful carry of a concealed weapon in these locations would be a criminal offense. §§ 790.01(2), 790.06(12)(d), Fla. Stat. Similarly, open carry of firearms is generally prohibited. § 790.053(1), Fla. Stat. Defendants concede that counties and municipalities "are not only free but indeed *required* to enforce the State's criminal laws." Def. MSJ at 56. However, in the very next breath, Defendants contend that Plaintiffs cannot enact any regulation because the preemption is to "the whole field" of regulation of firearms and ammunition. *Id.*

Basic rules of statutory construction require that statutory provisions relating to the same subject must be read together and construed to harmonize the provisions. *Fla. Dep't of State v. Martin*, 916 So. 2d 763, 768 (Fla. 2005) ("The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent."). The various provisions

at issue include: (i) the express preemption of firearms regulation "[e]xcept as provided by the State Constitution or general law," § 790.33(1), Fla. Stat.; (ii) the prohibited concealed carry of a concealed weapon in certain locations, for example, courthouses, polling places, and meetings of the governing bodies of the counties and municipalities, § 790.06(12), Fla. Stat.; and (iii) the requirement that local jurisdictions "enforce state firearms laws," § 790.33(2)(a), Fla. Stat. Defendants' construction of these provisions is inconsistent with (ii) and (iii), as local governments would not be permitted to perform the required enforcement action.

The only consistent construction is that local governments not only can but must adopt local regulation and ordinances that are consistent with and enforce the state firearms laws. This harmonization of the provisions is epitomized by the "policy and intent" provision, which expressly states *both* the prohibition of any future ordinance or regulations "unless specifically authorized by this section or general law" and requires local jurisdictions to "enforce state firearms laws." § 790.33(2)(a), Fla. Stat. The reference to "this section" includes the authorization and direction to local governments to "enforce state firearms laws," including the prohibitions in section 790.06(12); and the reference to "general law" authorizes counties to adopt ordinances and resolutions. §§ 125.01(1)(t), Fla. Stat. Any other reading would nullify one or more provisions of the state firearms laws. *See Larimore v. State*, 2 So. 3d 101, 106 (Fla. 2008).

D. The Preemption Law Does Not Preempt Regulation of Anything Other than Firearms and Ammunition (*Counties* Compl., Count X)

Defendants argue that although the statute itself does not even mention "accessories" as covered by the preemption, section 790.33 still preempts local governments from regulating items other than firearms or ammunition, such as accessories, because the purpose of such regulation is to regulate how firearms and ammunition are used and possessed. Defendants' argument again ignores the longstanding legal principle that "[e]xpress preemption requires a specific legislative

statement; it cannot be implied or inferred." *Browning*, 28 So. 3d at 886. Accordingly, the statute does not preempt the regulation of anything other than firearms and ammunition, and regulation of accessories is therefore not preempted. *See supra* Part V.C at 39–40. Plaintiffs respectfully seek a declaration from the Court to that effect.

X. DEFENDANTS' PROCEDURAL ARGUMENTS LACK VALIDITY.

In addition to arguing that the Penalty Provisions are constitutional, Defendants raise virtually the same standing, justiciability, and improper-defendant issues that this Court already rejected in its October 18, 2018 Order denying Defendants' Motion to Dismiss. Two of Defendants' renewed arguments are addressed briefly below. Defendants' remaining procedural contentions—that as local officials and governments, Plaintiffs lack standing to seek a declaratory judgment, Def. MSJ at 61; Gov. MSJ at 7–9; and that certain parties are "improper defendants," Def. MSJ at 61—have already been fully addressed in Plaintiffs' Summary Judgment Motion, Pl. MSJ at 52–56, and thus are not repeated here.

A. Plaintiffs Have Established A Justiciable Case or Controversy.

Defendants again argue that Plaintiffs have failed to present a justiciable case or controversy sufficient to confer standing because Defendants have not enforced or made actual threats to enforce the Penalty Provisions against Plaintiffs.[34] *See* Def. MSJ at 61–62; Gov. MSJ at 3-6. As discussed in Plaintiffs' Motion for Summary Judgment, *see* Pl. MSJ at 51-52, this is not what the law requires. Instead, as this Court has already ruled, establishing standing requires only that Plaintiffs "demonstrate they 'reasonably expect to be affected by the outcome of the

[34] Curiously, despite arguing that the Plaintiffs lack standing because they have not violated the statute, the Governor also contends that by bringing this declaratory judgment action, Plaintiffs have violated the Preemption Law's prohibition on public funds to defend lawsuits brought pursuant to the statute. Gov. MSJ at 9.

proceedings, either directly or indirectly.'" MTD Order at 2 (citing *Pub. Defender, Eleventh Jud. Cir. of Fla.*, 115 So. 3d 261, 282 (Fla. 2013)).[35]

Plaintiffs clearly satisfy this standard. Plaintiffs are not required to actually subject themselves to the Penalty Provisions in order to establish a case or controversy. As explained more fully in Plaintiffs' Motion for Summary Judgment, Pl. MSJ at 51, and as illustrated in the supporting affidavits and resolutions, Plaintiffs have been effectively prevented from exercising their constitutional rights to enact legislation and take other specific actions due to their well-grounded fear of being subjected to the severe Penalty Provision. SOF ¶¶ 10–12. Contrary to Defendants' claim that Plaintiffs present only a "speculative fear of something that may or may not materialize," Gov. MSJ at 6, Plaintiffs have provided specific, detailed descriptions of proposed legislative, administrative, and policy actions, along with specific evidence that Plaintiffs would take those actions, "but for" the Penalty Provisions and the threats to enforce them that they have received. SOF ¶ 11; *see also* SOF ¶¶ 6–17.[36] Because Plaintiffs suffer cognizable injuries as

[35] *See also Stadnik v. Shell's City, Inc.*, 140 So. 2d 871, 874 (Fla. 1962) ("It would be an unjustifiable burden to require an adversely affected party to await prosecution" or "immediate threat thereof" to seek relief from allegedly invalid laws.); *Marcus v. Scott*, No. 37-2012-CA-1260, 2012 WL 5962383 (Fla. Cir. Ct. Leon Cty. Oct. 26, 2012) at *1 ("Because the right to vote on a local ordinance is a fundamental function of the elected official, the chilling effect alleged by Plaintiffs on the exercise of their legislative functions is a sufficient harm to demonstrate standing without having to first be fined or removed from office before bringing suit.").

[36] For example, Plaintiff Daley, Commissioner for the City of Coral Springs, proposed a resolution to prohibit the sale of after-market large-capacity magazines, which he believed was not preempted. *See* SOF, Ex. 1 ¶¶ 11–12. Although a majority of the Coral Springs commissioners were prepared to pass such an ordinance they refrained from voting to do so, however, out of fear that doing so would subject them to the Penalty Provisions, particularly in light of threats of enforcement by citizens and certain actions by Defendants which suggested they would enforce the Penalty Provisions. *See id.* ¶¶ 18–26. Similarly, Plaintiff Mayor Raul Valdes-Fauli of the City of Coral Gables was threatened with enforcement of the Penalty Provisions after the Commission took a preliminary vote in favor of passing a firearms-related measure. As a result of these threats, the City Commission has been deterred from enacting measures such as the creation of "gun free zones." *See* SOF, Ex. 17 ¶¶ 5–9.

a result of the Penalty Provisions' suffocating effect on their constitutional rights, they clearly have an interest in determining the statute's validity and thus have standing to bring this action.

The Governor's extensive reliance on *Florida Carry v. City of Tallahassee*, 212 So. 3d 452 (Fla. 1st DCA 2017), is misplaced. *See* Gov. MSJ at 5-6. There, Florida Carry sued the City of Tallahassee and its elected officials for tabling a request to repeal two ordinances, which had been on the books for decades, but that conflicted with the newly enacted provisions of section 790.33. *Id.* at 455–57. The City and its officials counterclaimed, seeking a declaration that the Penalty Provisions were invalid. Unlike Plaintiffs here, the Tallahassee parties did not identify any actions that they would have taken but-for the Penalty Provisions, and instead emphasized their complete *lack* of action related to firearms. *See* Defs.' Mot. for Sum. J., *Fla. Carry, Inc. v. City of Tallahassee*, No. 2014-CA-001168, 2015 WL 13613433 (Fla. 2d Cir. Ct. Feb. 2, 2015). After concluding that Florida Carry's claim was meritless, the Court dismissed the counterclaim because the commissioners "were not and *could not* be subject to the penalty provisions" simply for failing to repeal the ordinances. *Id*. at 459 (emphasis added). Thus, far from presenting "facts remarkably similar to this case," Gov. MSJ at 5, *Florida Carry* is completely inapposite.

Defendants' additional contention that the "Office of the Attorney General has consistently maintained that the Attorney General is not responsible for enforcing the statute," Def. MSJ at 62, is not dispositive. As explained previously, *see supra* Part V.B, "opinions of the Attorney General are not statements of law" and would not insulate Plaintiffs from liability. *Bunkley v. State*, 882 So. 2d 890, 897 (Fla. 2004). Thus, these unofficial statements provide Plaintiffs with virtually no assurance that the Attorney General will not enforce the Penalty Provisions against them. Moreover, because Defendants retain discretion to enforce the law under a different interpretation, and the Attorney General's interpretation in any event does not shield them from actions brought by private parties, Plaintiffs continue to have their constitutional rights chilled. *See Wollschlaeger*,

848 F.3d at 1306 (finding that plaintiffs' fear of disciplinary action was not eliminated by a state agency's non-binding letter "clarifying" that plaintiffs' desired conduct was not prohibited). Plaintiffs are entitled to a declaratory judgment resolving their uncertainty.

B. Plaintiff Turkel has Standing to Vindicate Her Personal Constitutional Rights.

The Governor argues 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. Gov. MSJ at 9–10. In support of that defense, he cites a 101-year old decision, *Rickman v. Whitehurst*, 74 So. 205 (Fla. 1917), which addresses taxpayer standing to challenge unlawful expenditures, not the infringement of personal constitutional rights. *Id.* at 207.

The Governor's assertion that Plaintiff Turkel has alleged only "generalized harm" that is "no different than any other permanent resident of Florida who pays taxes and is registered to vote," Gov. MSJ at 9, is clearly belied by Ms. Turkel's sworn affidavit. *See also* Pl. MSJ at 53.

That affidavit establishes that Ms. Turkel has attempted to petition and instruct her local officials on firearms-related matters, and even drafted a proposed resolution which she presented to her Mayor for consideration. *See* SOF, Ex. 16 ¶¶ 5, 10–11. Her efforts, however, have been stymied and her advocacy silenced because of the pervasive fear of liability that her local elected officials and city may face under the Penalty Provisions. *Id.* ¶¶ 10–16. As a result, Plaintiff Turkel has been deprived of her rights to seek redress from her local government and to directly participate in the local democratic process, and has been chilled from exercising her right to associate with other citizens to advocate for political change. *Id.*

In short, the constitutional rights implicated here are *individual* to Plaintiff Turkel, rather than 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) (distinguishing

between standing for challenging unlawful expenditure and for mounting a First Amendment claim). Plaintiff Turkel therefore has standing to bring her claims.

CONCLUSION

Accordingly, Plaintiffs respectfully request that Defendants' motions for summary judgment be denied and that summary judgment be entered in the Plaintiffs' favor.

Dated: April 8, 2019

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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 April 8, 2019.

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