IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. SC21-917; SC21-918
FIRST DISTRICT CASE NO.: 1D19-2819

CITY OF WESTON, FLORIDA, DAN DALEY, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE CITY OF CORAL SPRINGS, FLORIDA, BROWARD COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF FLORIDA, ET AL.,

Petitioners.

v.

STATE OF FLORIDA, GOVERNOR RON DESANTIS, ATTORNEY GENERAL ASHLEY MOODY, AND FDLE COMMISSIONER RICHARD L. SWEARINGEN,

Respondents.

BRIEF OF LEAGUE OF WOMEN VOTERS OF FLORIDA, GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, BRADY, AND EQUALITY FLORIDA INSTITUTE, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae include organizations and individuals with an interest in preventing gun violence and promoting local democratic action.

The League of Women Voters of the United States is a nonpartisan, community-based political organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, it has more than 150,000 members and supporters nationwide. The League of Women Voters of Florida has thousands of members grouped into 29 local chapters. The League believes in local solutions to local issues and supports strong local governments as a way to strengthen democracy and encourage voter participation.

Giffords Law Center to Prevent Gun Violence is a non-profit policy organization serving lawmakers, advocates, legal professionals, gun violence survivors, and others who seek to reduce gun violence and improve the safety of their communities. The organization was founded more than a quarter-century ago following

a gun massacre at a San Francisco law firm and was renamed Giffords Law Center in 2017 after joining forces with the gun-safety organization led by former Congresswoman Gabrielle Giffords. Today, through partnerships with gun violence researchers, public health experts, and community organizations, Giffords Law Center researches, drafts, and defends the laws, policies, and programs proven to effectively reduce gun violence.

Brady is a non-partisan, non-profit organization that, since 1974, has worked to end gun violence through education, research, and legal advocacy. Brady has a substantial interest in ensuring that laws are not interpreted or applied in ways that fail to protect communities from the devastating effects of gun violence. For over 30 years Brady has argued and filed *amicus curiae* briefs in cases concerning firearms laws, which have been cited by numerous courts including the United States Supreme Court. Brady brought a lawsuit in *Wollschlaeger v. Governor of Florida*, which struck down as unconstitutional a Florida law restricting doctor-patient speech.

Equality Florida Institute, Inc., is the largest civil rights organization in the State of Florida dedicated to advancing full equality for Florida's lesbian, gay, bisexual, and transgender

community. Through education, grassroots organizing, coalition building, and the courts when necessary, Equality Florida seeks to ensure that no one in Florida suffers harassment or discrimination on the basis of their sexual orientation or gender identity. Equality Florida's work includes gun violence prevention, given the disproportionate impact of gun violence on minority communities and the massacre at Pulse Nightclub in Orlando. Equality Florida has an interest in the issue presented in this case, as it may have significant implications on Equality Florida's work in Florida.

I. INTRODUCTION

Active local political participation has long been vital to our nation's democracy.[1] Local democratic action makes it possible for citizens to participate in policymaking within their communities—debating and passing laws that affect their friends, neighbors, and colleagues. The penalty provisions of Section 790.33 threaten local democracy through an unprecedented and unconstitutional expansion of state preemption. The Court should reverse the court of appeal's decision that the penalty provisions of Section 790.33 are constitutional.

Over the past three decades, states have increasingly turned to preemption statutes to limit local regulation of firearms. In some respects, Section 790.33 is similar to many of these statutes. Its stated intent is "to provide uniform firearm laws in the state," Fla. Stat. § 790.33(2)(a), and it declares "null and void" any "existing [local] ordinances, rules, or regulations" in the field of firearms and ammunition, *id.* § 790.33(1).

But in 2011, at the behest of the National Rifle Association, the

[1] *See* Alexis de Tocqueville, *Democracy in America* 66-70 (8th ed. 1848) (extolling the virtues of the New England township).

Florida legislature took preemption one dangerous step further, amending Section 790.33 to subject local governments and their legislators to personal liability for their votes in the field of firearm regulation. In a subsection titled "penalties," Section 790.33 provides that "[a]ny person . . . that violates the Legislature's occupation of the whole field of regulation of firearms and ammunition . . . by enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon such exclusive occupation of the field shall be liable." *Id.* § 790.33(3)(a). Section 790.33 further provides that local officials who knowingly and willfully violate the statute shall be fined up to $5,000, *id.* at 3(c), and may not be indemnified for the costs of defending themselves, *id.* at 3(d).

Amici urge the Court to reverse the First District Court of Appeal's decision upholding the penalty provisions of Section 790.33. Prior to Florida's enactment of the penalty provisions, no state had *ever* imposed penalties on local officials for their legislative activity. In the proceedings below, the State and the National Rifle Association contend that this unprecedented extension of preemption authority is necessary to prevent rogue local governments from ignoring state

law. This supposed rationale cannot justify an unconstitutional incursion into legislative immunity, but in any event, as *Amici* discuss below, there is no evidence that local governments are ignoring or willfully violating Florida's firearm preemption law. The primary effect of the penalty provisions will be to chill legitimate exercises of local legislative authority.

II. FLORIDA'S SECTION 790.33 IS PART OF A NATIONAL TREND TOWARD PUNITIVE PREEMPTION OF LOCAL POLICYMAKING

Section 790.33 provides that the state of Florida is "occupying the whole field of regulation of firearms and ammunition . . . to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto." Fla. Stat. § 790.33(1). This type of law—commonly referred to as a "preemption statute"—has become an increasingly popular tool for state governments and lobbyists in recent decades.

The expansion of Section 790.33 in 2011 to include harsh penalties represents a new trend of *punitive* preemption statutes that has emerged specifically in the context of firearm regulation. These statutes not only preempt local policymaking authority, but

also threaten municipalities and elected officials with civil or even criminal liability for legislating in the field of firearms.

Starting in the late 1970s and early 1980s, a handful of states passed laws preempting specific aspects of firearms regulation.[2] By the end of the 1980s, at least ten states had enacted broad preemption statutes.[3] Florida was one of these states: it passed the initial version of Section 790.33 in 1987. The original Section 790.33 described the field that the state legislature exclusively occupied, but it did not include the penalty provisions at issue in the State's appeal. Instead, like other preemption statutes at the time, it left enforcement to parties who could challenge the validity of an allegedly preempted local ordinance in court.[4] Today, 45 states have adopted statutes that

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[2] Duke Helfand, Two-Pronged Attack on Guns Launched, L.A. Times, Apr. 3, 1996; see also Webster et al., Effects of Maryland's Law Banning "Saturday Night Special" Handguns on Homicides, American Journal of Epidemiology, Vol. 155, at 406 (2002).

[3] W. Va. Code § 8-12-5a (1982); S.D. Codified Laws § 9-19-20 (1983); Ky. Rev. Stat. Ann. § 65.870 (1984); Alaska Stat. § 29.35.145(a) (1985); Del. Code Ann. tit. 22, § 111 (1985); La. Rev. Stat. Ann. § 40:1796 (1985); N.D. Cent. Code § 62.1-01-03 (1985); S.C. Code Ann. § 23-31-510 (1986); Fla. Stat. Ann. § 790.33(1987); Me. Rev. Stat. Ann. title 25, § 2011 (1989).

[4] *See* Firearms and ammunition—Uniform Act, 1987 Fla. Sess. Law Serv. 87-23.

preempt at least some aspect of firearm or ammunition regulation.[5]

In 2011, the Florida legislature amended Section 790.33 to include the unprecedented penalty provisions at issue here, a dangerous change in the course of preemption law. The amended Section 790.33 appears to be the first preemption statute that penalized local governments and local officials in their individual capacities for their votes on legislation. For the first time, a local legislator could be *personally punished* for voting to enact (or "causing to be enforced") an ordinance that addresses local gun violence.

In the wake of the enactment of Section 790.33's penalty provisions, several other states amended their firearm preemption laws to penalize local legislators for their votes. In 2014, Mississippi augmented its firearm preemption statute by subjecting local officials to a $1,000 fine for voting for an ordinance that conflicts with the state statute, plus "all reasonable attorney's fees and costs incurred by the party bringing the suit." Miss. Code. Ann. § 45-9-53(5)(c). The

[5] Giffords Law Center, *Preemption of Local Laws*, https://lawcenter.giffords.org/gun- laws/policy-areas/other-laws-policies/preemption-of-local-laws (last visited Dec. 18, 2019).

Mississippi preemption statute, like Section 790.33, also prohibits the use of public funds to defend or reimburse local officials for legal expenses incurred in defending themselves.

In 2016, Arizona enacted a law making local officials personally liable for a fine of up to $50,000 for "knowing and willful" violations of the state law. Ariz. Rev. Stat. Ann. § 13-3108. Local officials are also subject to termination. And in Kentucky, the state amended its firearm preemption statute to *criminalize* violations of the state's preemption of firearms regulation. The amended statute declares that "[a] violation of [the state's preemption of firearms regulation] by a public servant shall" constitute "official misconduct," a misdemeanor. Ky. Rev. Stat. Ann. § 65.870 (6). The statute further provides that local legislators are liable for the attorney's fees and costs of those who successfully challenge local action that violates the preemption statute "or the spirit thereof." *Id.* § 65.870 (4)(a).

The 2011 penalty provisions added to Section 790.33 are thus in the vanguard of an alarming trend. As discussed below, this unprecedented approach to enforcing state preemption law is a threat to local democracy that serves no valid purpose.

III. THE PENALTY PROVISIONS OF SECTION 790.33 WILL CHILL LEGITIMATE EXERCISES OF LOCAL LEGISLATIVE AUTHORITY

Section 790.33's penalty provisions will deter local legislators from legitimately exercising their legislative authority. Indeed, Florida courts have recognized that given the "penalties that can apply if missteps are made in the promulgation of policies in this field . . . apprehension is understandable." *Fla. Carry, Inc. v. Univ. of Fla.*, 180 So. 3d 137, 154 (Fla. 1st DCA 2015) (Makar, J., concurring in part and concurring in the result). Critically, Section 790.33's harsh provisions will deter local legislators from enacting legislation that may be perfectly valid under Section 790.33. For example, a local legislator may seek to enact a zoning ordinance preventing individuals from manufacturing goods—including firearms—in residential areas. Such an ordinance may well be valid under Section 790.33, which permits "[z]oning ordinances that encompass firearms businesses along with other businesses," so long as they are not "designed for the purpose of restricting or prohibiting the sale, purchase, transfer, or manufacture of firearms or ammunition as a method of regulating firearms or ammunition." *See* Att'y General Op. 2016-06 (opining that regulating manufacturing as a home occupation is not preempted);

cf. Peter Garrett Gunsmith, Inc. v. City of Dayton, 98 S.W.3d 517 (Ky. Ct. App. 2002) (holding that zoning ordinance restricting locations in which gun shops could operate did not violate Kentucky's preemption statute). Nonetheless, rather than risk penaltyunder the statute, the local legislator may instead avoid enacting such a zoning ordinance altogether. With local representatives immobilized by fear of enacting even legitimate legislation in an area traditionally reserved to local control, Florida citizens will be deprived of the safety benefits that zoning regulations provide.

Contrary to the NRA's suggestion in the proceedings below, local legislators cannot avoid punishment by simply declining to enact preempted ordinances, because the question of whether legislation violates Section 790.33 is often the subject of considerable disagreement. Indeed, legislators, courts, and the Attorney General often reach contrary conclusions as to the application and scope of Section 790.33. In *Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So. 2d 504 (Fla. 3rd DCA 2002), for example, the City of South Miami passed an ordinance requiring locking devices on firearms stored in the city. The City sought guidance from the Attorney General, who opined that the ordinance was not preempted by

Section 790.33. *See* Att'y General Op. 2000-42. The NRA sued the City challenging the ordinance, and the Circuit Court ruled in the City's favor, also determining the ordinance did not violate Section 790.33. Finally, on appeal, the Third District Court of Appeal reversed and remanded the trial court's decision, determining the ordinance *was* preempted. *Nat'l Rifle Ass'n of Am., Inc. v. City of S. Miami*, 812 So. 2d 504 (Fla. 3rd DCA 2002). Facing the potential for disagreement at every level, it would be rational for a local legislator to simply avoid legislating entirely, rather than risk possible punishment dependent on the outcome of hotly-contested litigation (particularly when a legislator may not be indemnified for the costs of defending themselves). This outcome is even more likely given "[i]t is no defense" that a local government entity was "acting in good faith or upon advice of counsel." § 790.33(3)(b).

Similarly, in *Florida Carry, Inc. v. University of Florida*, the Circuit Court upheld the University of Florida's policy prohibiting firearms in university housing. No. 12014-CA-104, 2014 WL 11256284, at *1 (Fla. 8th Cir. Ct. July 30, 2014). The First District Court of Appeal upheld the lower court's decision in three separately-written opinions, determining that the University's policy was not

preempted under Section 790.33. 180 So. 3d at 148. Concurring in the result, Judge Makar wrote that he would have avoided the preemption issue altogether, noting the "complex web of Florida's firearms laws, with an evolving state and federal overlay of constitutional rights," and the "difficult statutory interpretation questions" implicated. *Id.* at 155. *See also Fla. Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966 (Fla. 1st DCA 2013) (*en banc*) (reversing the Circuit Court on preemption issue in seven separate opinions). The frequent disagreement over the interpretation of Section 790.33 increases the risk that local legislators will avoid enacting legitimate legislation, depriving Florida citizens of the benefits of such policies. This risk is particularly pronounced here given the potentially broad reach of Section 790.33, which declares that the state legislature has occupied "the whole field of regulation of firearms and ammunition . . . to the exclusion of all existing and future . . . ordinances . . . *relating thereto*." (emphasis added).

As the previous examples demonstrate, courts frequently disagree on the scope of firearm-related preemption in Florida and what constitutes legitimate, non-preempted local lawmaking. Against this backdrop, Section 790.33's harsh penalty provisions will deter

local legislators from experimenting with *any* solutions directed to the problem of gun violence—even those solutions that are not necessarily preempted. The result is that Floridians will be completely deprived of ordinances promoting their safety and security from gun violence, an outcome the preemption law does not contemplate. If upheld, Section 890.33's preemption penalties may inspire similar provisions in other areas of law. Broader adoption of such penalties would further chill Florida's local legislators and deprive Floridians of public policies that address their needs and concerns.

IV. THERE IS NO EVIDENCE THAT THE PENALTY PROVISIONS ARE NECESSARY TO ENFORCE THE PREEMPTION LAW OR TO PROTECT SECOND AMENDMENT RIGHTS

The chilling effects of the penalty provisions are undesirable and unnecessary. Florida may pass laws preempting local regulation—and may permit individuals to sue to enforce such laws—without subjecting local legislators to individual liability for their legislative activity. The State's and the NRA's assertions to the contrary are meritless.

In the proceedings below, the State warned that "[i]f allowed to

stand, the [trial court's] decision will not only invite the development of a patchwork regulatory regime in the area of firearms but also render the Legislature impotent to deter power grabs by local officials in other areas."[6] But in its briefing before both the court of appeals, the State has failed to offer any argument or evidence that the penalty provisions of Section 790.33 are necessary to prevent the development of "a patchwork regulatory scheme in the area of firearms." Nor does the State explain or support its suggestion that "power grabs by local officials" are a problem in other policy areas. In short, the State defends its unprecedented and unconstitutional expansion of preemption authority by pointing to problems that do not exist.

Similarly, the NRA argued in its amicus brief below that the unprecedented penalty provisions of Section 790.33 "are necessary to preserve and protect the Florida Legislature's prerogative to occupy the field of firearm regulation to preempt unlawful local action."[7] "[L]ocal governments and government officials," the NRA alleges, "knowingly—and contemptuously—violated state law with

[6] Appellants' Br. at 2.
[7] NRA Amicus at 2.

impunity."[8] As with the State's assertions concerning the need for the penalty provisions, the NRA's claims are baseless.

The NRA points to two examples of the "contemptuous" violations of statelaw that purportedly plagued Florida prior to 2011, but neither involves local governments ignoring or willfully violating the State's firearm preemption law.

First, citing a "Final Bill Analysis" of the 2011 amendments by the Florida HouseJudiciary Committee, the NRA asserts that a local government had enacted an ordinance "prohibiting high-capacity ammunition magazines."[9] But no such ordinance was ever enacted. On the contrary, the local government to which the Committee's analysis refers—Palm Beach County—deliberatively decided ***not*** to vote on the proposed ordinance.[10] Instead, a County Commissioner proposed, in deference to Florida's firearm preemption law, a "resolution calling for the Florida Legislature to pass a state ban on the sale of the high-capacity ammunition magazines."[11] The County's

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[8] *Id.* at 1.
[9] *Id.* at 4.
[10] Fla. H. Judiciary Comm., H.B. 45 Final Bill Analysis, 2011 Leg., 113th Sess., at 3 n.14.
[11] A. Reid, *PBC Gun Control Advocates Suffer More Setbacks*, SOUTH FLORIDA SUNSENTINEL, Feb. 15, 2011, https://www.sun-

approach evinced respect, not "contempt," for state law.

The NRA's other example is the lawsuit it filed nearly 20 years ago against the City of South Miami in which it challenged a local regulation requiring the use of locking devices on firearms. *See City of S. Miami*, 812 So. 2d at 504. But even that case—the only one the NRA cites in support of its argument that punitive preemption is necessary—does not show that local officials were ignoring Florida law or taking frivolous positions in litigation. As discussed above, the City of South Miami had, before it was sued by the NRA, solicited the views of the Florida Attorney General, who had opined that the City's locking ordinance was not preempted under Section 790.33. Moreover, the trial court ruled in the City's favor. *See id.* at 504. Although the Florida Court of Appeal for the Third District ultimately reversed the trial court, it expressly recognized the good faith of the City in defending its ordinance, explaining that the case involved "various well-meaning litigants eye-ball to eye-ball across counsel table," with "the City wondering whether its ordinance has been preempted." *Id.* at 504-05.

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sentinel.com/news/fl-xpm-2011-02-15-fl- gun-control-palm-20110215-story.html.

The NRA also justifies the penalty provisions on the basis that they are necessary to protect Second-Amendment rights. Echoing its language concerning alleged violations of Florida state law, the NRA charges that "many" local governments have "knowingly and contemptuously" violated the Second Amendment.[12] But, again, the two examples the NRA cites do not support its disparagement of local governments. First, the *City of South Miami* litigation concerned a city ordinance passed in 2000, several years before the U.S. Supreme Court decided *District of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 750 (2010). At the time, no court had held that a similar ordinance violated the Second Amendment. Indeed, until the Supreme Court decided *McDonald* in 2010, it was unclear if the Second Amendment even applied to state and local legislation. *See Heller*, 554 U.S. at 620 n.23; *McDonald*, 561 U.S. at 749.

As for the NRA's example of the proposed Palm Beach County ordinance regulating high-capacity ammunition magazines (which, as explained above, the County did not even enact), that regulation

[12] NRA Amicus Br. at 21.

would not have violated the Second Amendment. Six federal circuit courts have considered Second-Amendment challenges to similar regulations of high-capacity ammunition magazines; each circuit upheld the challenged law. *See Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019); *Assoc. of New Jersey Rifle and Pistol Clubs, Inc. v. Att'y General New Jersey*, 910 F.3d 106 (3rd Cir. 2018); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011). While the NRA may disagree with all of those decisions, it cannot say with a straight face that a legislator proposing, considering, or voting on a law restricting high-capacity ammunition magazines is "knowingly and contemptuously" violating the Second Amendment.

In sum, the NRA has presented no evidence of rogue local officials willfully violating state law or constitutional rights. On the contrary, the NRA's examples show local legislators working in good faith on solutions to difficult policy problems. The State's and the NRA's effort to punish local legislators for pursuing such solutions underscores the importance of legislative immunity.

V. CONCLUSION

For the foregoing reasons, *Amici* respectfully request that the Court reverse the court of appeal's order.

Dated: November 24, 2021 Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned electronically filed the foregoing with the Clerk of the Courts on November 24, 2021, by using the E-FilingPortal, which will send a notice of electronic filings to all counsel of record, including the individuals listed in the accompanying service list.

/s/ Kenneth Duvall
Kenneth Duvall

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Bookman Old Style 14-point font, contains 3,755 words, and otherwise complies with Florida Rules of Appellate Procedure 9.210(a)(2)(A) and 9.045.

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