

Case Nos. SC21-917, SC21-918
L.T. CASE NO. 1D19-2819

In the Supreme Court of Florida

NICOLE "NIKKI" FRIED, FLORIDA COMMISSIONER OF
AGRICULTURE AND CONSUMER SERVICES, ET AL.,
Petitioners,

v.

STATE OF FLORIDA, ET AL., *Respondents.*

ON DISCRETIONARY REVIEW FROM THE
FIRST DISTRICT COURT OF APPEAL

**BRIEF OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF
AMERICA, INC. IN SUPPORT OF RESPONDENTS**

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TABLE OF CONTENTS

Identity and Interest of Amicus Curiae 1

Summary of the Argument 2

Argument 5

 I. The State occupies the whole field of firearm regulation;
 counties may require nothing more than a records check
 and waiting period. 5

 II. The judgment of the Legislature is that the Penalty
 Provisions are necessary to protect citizens from unlawful
 local ordinances intended to regulate the exercise of their
 right to keep and bear arms. 10

Conclusion 16

Certificate of Service 17

Certificate of Compliance 17

TABLE OF AUTHORITIES

Page(s)

Cases

City of Boca Raton v. State,
595 So. 2d 25 (Fla. 1992) 6

Collier Cty. v. State,
733 So. 2d 1012 (Fla. 1999) 6

Fla. Carry, Inc. v. City of Tallahassee,
212 So. 3d 452 (1st DCA 2017) 13

Florida Carry, Inc. v. University of North Florida,
133 So. 3d 966 (Fla. 1st DCA 2013)6, 7, 9

Freeman v. City of Tampa, Fla.,
No. 8:15-CV-2262-T-30EAJ, 2015 WL 8270025 (M.D.
Fla. Dec. 8, 2015)..... 13

NRA. v. City of S. Miami,
774 So. 2d 815 (Fla. 3d DCA 2000) 12

NRA v. City of S. Miami,
812 So. 2d 504 (Fla. 3d DCA 2002)2, 6, 11

Rinzler v. Carson,
262 So. 2d 661 (Fla. 1972) 10

Sarasota Cty. v. Sarasota Church of Christ, Inc.,
667 So. 2d 180 (Fla. 1995) 6

State v. City of Sunrise,
354 So. 2d 1206 (Fla.1978) 6

Zingale v. Powell,
885 So. 2d 277 (Fla. 2004) 8

Statutes

Fla. Stat. § 790.33(1).....*passim*

Fla. Stat. § 790.33(2)(a).....	11
Fla. Stat. § 790.33(2)(b).....	13
Fla. Stat. § 790.33(3).....	<i>passim</i>

Other Authorities

Fla. Const., Art. I, § 8(a)	2
Fla. Const., Art. I, § 8(b)	7
Fla. Const., Art. I, § 8(c)	7
Fla. Const., Art. III, § 1.....	5
Fla. Const., Art. VIII, § 1(a).....	7
Fla. Const., Art. VIII, § 5(b).....	7
U.S. Const. amend II.....	1

Identity and Interest of Amicus Curiae

Founded in 1871, Amicus Curiae the National Rifle Association of America, Inc. (the “NRA”) is the oldest civil rights organization in America. It is the Nation’s foremost defender of Second Amendment rights and leading provider of firearm marksmanship and safety training for civilians. Among the NRA’s millions of members are hundreds of thousands of Florida citizens prejudiced by the Petitioners’ desire to impose unlawful ordinances upon their localities. An important function of the NRA is to ensure that law-abiding citizens’ right to keep and bear arms is preserved and protected against such infringement.

In direct violation of Florida’s preemption statute, Section 790.33(1), Florida Stat. (the “Preemption Statute”), local governments enacted ordinances that unlawfully regulate the sale, possession, and use of firearms and have proposed even more unlawful ordinances. The penalty provisions of the Preemption Statute, Section 790.33(3), Florida Stat. (the “Penalty Provisions”), are intended to curtail this overreach by deterring and remedying unlawful local government regulation infringing NRA members’ rights under the Second Amendment to the United States Constitution and

Article I, Section 8(a) of the Florida Constitution.

The NRA and its members have borne the undue expense and burden of challenging local government infringement of their fundamental right to keep and bear arms. *See, e.g., NRA v. City of S. Miami*, 812 So. 2d 504 (Fla. 3d DCA 2002) (striking City ordinance requiring firearm locking devices as preempted). Recognizing the need to deter such infringement, the Penalty Provisions allow fees and damages to those who prevail in challenging an unlawful ordinance. The Penalty Provisions shift litigation costs from the blameless prevailing party such as the NRA and its members to the infringing locality.

Petitioners ask this Court to overrule the Legislature's judgment and strike the Penalty Provisions, opening the door to allowing localities to infringe fundamental rights with impunity. The NRA has a strong and continuing interest in ensuring that the Penalty Provisions are upheld.

Summary of the Argument

The Florida Legislature has fully occupied the field of firearm regulation. The Preemption Statute prohibits local governments from enacting ordinances regulating firearms and ammunition, including

their “purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation.” Section 790.33(1), Fla. Stat.

Despite the Preemption Statute—and determined to force litigation expenses upon anyone but themselves—local governments wish to continue imposing ordinances to unlawfully regulate the sale, possession, and use of firearms and ammunition. Petitioners make clear they will continue to enforce and enact even more such unlawful regulations if this Court strikes the Penalty Provisions.

The Florida Legislature adopted the Penalty Provisions to prevent unlawful overreach by holding local governments and their officials accountable for violating the Preemption Statute. Section 790.33(3), Fla. Stat. For all of the reasons held by the First District and demonstrated by Respondents, this Court should reject the Petitioners’ demands and uphold the constitutionality of the Penalty Provisions.

The Penalty Provisions are permissible under the Constitution and deemed necessary by the Legislature to preserve Florida’s structure of government and protect the fundamental, individual rights of every law-abiding citizen against overreach by localities.

Without the Penalty Provisions, individuals and entities are unprotected from the undue burden and expense of litigating to restore their guaranteed freedoms. The Penalty Provisions are practical in every sense: they specifically target and deter unlawful infringement of the right to keep and bear arms by providing attorney's fees and damages to a prevailing challenger. The Penalty Provisions serve the Legislature's purpose of deterring local governments from enacting statutorily-preempted firearm legislation that deprives citizens of their guaranteed rights.

Petitioners include more than 100 localities and their officials who wish to turn the Constitution on its head. Petitioners sought this Court's review because the Penalty Provisions deter them from enacting statutorily-preempted, unlawful regulations that infringe the right to keep and bear arms. Petitioners wish to force NRA members and other law-abiding citizens to expend substantial resources challenging ordinances that Petitioners know are preempted. Petitioners have it backwards. The Constitution shields individual freedoms from infringement; it does not protect localities from the consequences of their regulatory overreach.

Petitioners ask this Court to reverse the considered judgment of

the Legislature that the Penalty Provisions are necessary to ensure the effectiveness of the Preemption Statute. History and the Petitioners' lawsuit demonstrate that the Preemption Statute is not effective without the Penalty Provisions. Petitioners threaten more unlawful regulations if the Penalty Provisions are struck down. Citizens would be forced to forgo the exercise of their rights or undertake expensive, time-consuming litigation challenging hundreds of ordinances across dozens of localities.

Because the Penalty Provisions are a permissible exercise of the Legislature's power and are demonstrably necessary to preserving citizens' fundamental right to keep and bear arms, this Court should affirm the First District and reject Petitioners' challenge.

Argument

I. The State occupies the whole field of firearm regulation; counties may require nothing more than a records check and waiting period.

The Florida Legislature is empowered to fully occupy a field of regulation except as expressly provided by the State Constitution: "The legislative power of the state shall be vested in a legislature of the State of Florida" Art. III, § 1, Fla. Const. The Legislature's power to occupy a field in this manner does not conflict with

localities' home rule authority. *See, e.g., State v. City of Sunrise*, 354 So. 2d 1206, 1209 (Fla.1978) (“Legislative statutes are relevant only to determine limitations of [localities’] authority.”). A local government must act within the constraints imposed by statute. *See, e.g., City of Boca Raton v. State*, 595 So. 2d 25, 28 (Fla. 1992) (“a municipality may . . . exercise any governmental, corporate, or proprietary power for a municipal purpose except when expressly prohibited by law”), *modified on other grounds sub nom. Collier Cty. v. State*, 733 So. 2d 1012 (Fla. 1999), and *holding modified by Sarasota Cty. v. Sarasota Church of Christ, Inc.*, 667 So. 2d 180 (Fla. 1995).

The Preemption Statute fully exercises the Legislature’s power: “Except as *expressly provided by the State Constitution* or general law, the Legislature hereby declares that it is occupying *the whole field* of regulation of firearms . . . including the purchase, sale, transfer . . . ownership, [and] possession . . . thereof” Section 790.33(1), Fla. Stat. (emphases added); *see also City of South Miami*, 812 So. 2d at 505–06.

In addition to its plenary legislative power, the Legislature is entrusted with the power to protect constitutional rights. As explained in *Florida Carry, Inc. v. University of North Florida*, 133 So.

3d 966 (Fla. 1st DCA 2013) (en banc) (rejecting a state university’s attempt to regulate firearms as preempted):

The Legislature’s primacy in firearms regulation derives directly from the Florida Constitution. Article I, § 8(a), of the Florida Constitution provides:

The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.

The phrase “by law” indicates that the regulation of the state right to keep and bear arms is assigned to the legislature and must be enacted by statute. . . . Indeed, the legislature has reserved for itself the whole field of firearms regulation in section 790.33(1)

Id. at 972 (citation omitted).

The Legislature may preempt local governments—which “may be created, abolished or changed by law,” Art. VIII, § 1(a), Fla. Const. (counties); *id.* § 2(a) (municipalities)—from regulating firearms except as the Constitution expressly provides. Florida’s Constitution expressly provides counties (but not municipalities) only the “authority to require a criminal history records check and a 3- to 5-day waiting period, excluding weekends and legal holidays, in connection with the sale of” certain firearm sales. Art. VIII, § 5(b), Fla. Const.; *see also* Art. I, § 8(b) and (c), Fla. Const. (the Legislature shall

implement a “a mandatory period of three days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun”).

The Florida Constitution does not authorize local governments to enact any further regulation. “Any inquiry into the proper interpretation of a constitutional provision must begin with an examination of that provision’s *explicit language*.” *Zingale v. Powell*, 885 So. 2d 277, 282 (Fla. 2004) (emphasis added and citation omitted). Nothing in the Constitution’s explicit language authorizes a local government to regulate beyond the narrow and specific permission granted over criminal history records checks and waiting periods.

Petitioners wish to impermissibly regulate matters precluded them by the Preemption Statute. Florida law prohibits Petitioners from requiring records of firearm transactions, notices at gun shows, tagging guns and controlling access doors at gun shows, and other proposed ordinances.

A county (but not a municipality) has only the power to require a 3- to 5- day waiting period and criminal history records check. Local governments lack any power to criminalize other conduct under the

guise that it may be useful in enforcing the records check and waiting period. Such local measures usurp the Legislature’s plenary power and frustrate its protection of the citizens’ right to keep and bear arms.

Among other impermissible regulations, Petitioners wish to unlawfully compel certain records of privately purchased and owned firearms, including serial numbers and of the identities of their owners. See R. 1609–10, 1639–40. Local governments do not possess any power to enact ordinances requiring records retention and inspection. The approach taken in *Florida Carry* suggests that inquiry into the counties’ authority “must first begin with an examination of *the actual language of the constitutional provision.*” 133 So. 3d at 973–74 (emphasis added). That inquiry demonstrates that counties possess narrow authority to require a records check and waiting period—but nothing more. Any ordinance requiring more violates the Preemption Statute because nothing within a county’s narrow authority confers the power to compel records of firearm purchases and owners.

Petitioners concede that “the County Commissions are in doubt as to their rights to enact and enforce such regulations” R. 1640.

There is good reason for Petitioners' doubt, and that doubt must be resolved in favor of the Preemption Statute's broad sweep. "[A]n ordinance must not conflict with any controlling provision of a state statute, and if any doubt exists as to the extent of a power attempted to be exercised which may affect the operation of a state statute, the doubt is to be resolved against the ordinance and in favor of the statute." *Rinzler v. Carson*, 262 So. 2d 661, 668 (Fla. 1972) (firearm ordinance preempted).

Local governments must act within the constraints of the Preemption Statute. The Penalty Provisions are only implicated when localities ignore those constraints.

II. The judgment of the Legislature is that the Penalty Provisions are necessary to protect citizens from unlawful local ordinances intended to regulate the exercise of their right to keep and bear arms.

The Legislature enacted the Preemption Statute in 1987 to occupy the whole field of firearm regulation, to prohibit local governments from enacting firearm ordinances, and to declare existing local firearm ordinances null and void. Section 790.33(1), Florida Stat. (1987). The Legislature did so, among other reasons, to "prohibit the enactment of any future ordinances or regulations

relating to firearms, ammunition, or components thereof unless specifically authorized by this section or general law.” *Id.* at 790.33(2)(a).

But the Preemption Statute proved inadequate without appropriate enforcement provisions. Local governments continued to enact ordinances that unlawfully infringed upon the right to keep and bear arms. *See, e.g., City of S. Miami*, 812 So. 2d at 505; *see also* R. 1012–13 (“local governments have regulated or considered regulating firearms in a variety of ways, including measures that would prohibit concealed carry permit holders from lawfully carrying their firearms on municipal or county property or ban high capacity ammunition clips”) (quoting the Final Bill Analysis).

In *NRA v. City of South Miami*, the NRA was the lead plaintiff for citizens challenging an ordinance that mandated locking devices on firearms stored within the City of South Miami. R. 1012. The NRA prevailed in its lawsuit and eventually earned restoration of South Miamians’ rights. But the NRA’s legal victory took two years to obtain and—in the absence of any Penalty Provisions—left NRA members without recourse for the substantial amount of time, effort, and expense the NRA incurred. The City’s aggressive litigation tactics

compounded the NRA's expenditure of time, effort, and expenses by forcing the NRA to fight jurisdictional and discovery issues, in addition to the substantive issue of whether the ordinance was preempted. *See, e.g., NRA v. City of S. Miami*, 774 So. 2d 815, 816 (Fla. 3d DCA 2000) (appeal regarding NRA's standing).

The City's overreach and litigation tactics forced the NRA to incur substantial litigation expenses to obtain a ruling from the Third District that the City's ordinance should never have been enacted. Unlike the NRA and its members, neither the City nor its officials faced any monetary consequence. The City's officials were not fined for their unlawful conduct. The City never had to reimburse the prevailing parties for their attorney's fees or compensate them for the damages of being subjected to an unlawful ordinance. The unlawful ordinance remained on the books for two years, during which time fundamental rights were infringed and law-abiding citizens suffered damages and incurred litigation costs.

The Legislature correctly determined that the Preemption Statute alone was insufficient to deter and remedy local overreach. More was needed to stop local governments from enacting unlawful ordinances and forcing residents to choose between incurring the

burden and expense of protracted litigation or preserving their fundamental right to keep and bear arms. The Legislature added the Penalty Provisions to the Preemption Statute “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.” Section 790.33(2)(b), Florida Stat.

Petitioners concede that the Penalty Provisions are successfully advancing the Legislature’s purpose: “Since passage of the Penalty Provisions, local elected officials . . . have avoided enacting such regulations for fear of the Penalty Provisions.” *Pets. Br.*, at 5 (citing R. 575–76); *see also Fla. Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, 456 (1st DCA 2017) (noting that the city formally ceased enforcement of a 1988 firearm ordinance because of the Penalty Provisions); *Freeman v. City of Tampa, Fla.*, No. 8:15-CV-2262-T-30EAJ, 2015 WL 8270025, at *3 (M.D. Fla. Dec. 8, 2015) (noting that the city repealed a 2009 firearm ordinance after enactment of the Penalty Provisions in 2011). By Petitioners’ own admission, the

Penalty Provisions have successfully prevented local governments from enacting unlawful ordinances. Local elected officials are now more inclined to obey the Preemption Statute, declining to enact or enforce unlawful firearm regulations, thereby preserving constitutional rights and saving citizens the extraordinary effort and expense of challenging unlawful ordinances that never should have been passed.

Petitioners include local governments that have declared their intention to enact “a panoply of” firearm regulations, R. 102 (Amended Complaint), that run afoul of the Preemption Statute as the NRA demonstrated below, A.R. 430 (NRA’s amicus brief to the First District). Petitioners admit that they have not enacted these unlawful firearm regulations only because of the Penalty Provisions. *See* R. 102. Petitioners also admit that they intend to enact these unlawful firearm regulations if they succeed in having the Penalty Provisions struck down. *See id.* Without the Penalty Provisions, Petitioners would have already enacted these unlawful ordinances without regard to the Preemption Statute and forced private citizens to undertake the burden and expense of challenging the ordinances in court. *See id.* If the Penalty Provisions are struck down, Petitioners

threaten to resurrect the City of South Miami's playbook that the Legislature foreclosed.

Petitioners' arguments demonstrate the need for—and effectiveness of—the Penalty Provisions. Without the Penalty Provisions, Petitioners and other local governments will follow through on their threat to enact a flood of unlawful regulations infringing the exercise of the constitutional right to keep and bear arms. This would cause the very harm the Legislature undertook to avoid. Prohibited firearm regulations will spawn costly litigation all over the state, with aggrieved citizens shouldering undue burden and cost with no accountability imposed upon infringing localities. This harm is not speculative. Petitioners have announced their intention to disregard the constraints of the Preemption Statute if the Penalty Provisions are struck. To avoid this threatened infringement of fundamental rights and the corresponding cascade of harm to law-abiding citizens, this Court should affirm the First District and uphold the considered judgment of the Legislature in enacting the Penalty Provisions.

Conclusion

The Preemption Statute's Penalty Provisions are necessary to protect the fundamental right to keep and bear arms because they deter and remedy unlawful local government infringement against those rights. The Penalty Provisions are constitutional and should be upheld for the reasons demonstrated by Respondents and held by the First District below.

Respectfully submitted,

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I certify that a copy of this brief was filed and served via the E-Portal on February 24, 2022, on the individuals listed in the accompanying service list.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Bookman Old Style, 14-point font, contains 2,859 words, and otherwise complies with the requirements of Florida Rules of Appellate Procedure 9.210(a) and 9.045.

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