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

CASE NO. 2018 CA 000699

CITY OF WESTON, FLORIDA; MAYOR DANIEL J. STERMER, COMMISSIONER MARGARET BROWN, and COMMISSIONER BYRON L. JAFFE, each as elected officials of the City of Weston, Florida;

CITY OF MIRAMAR, FLORIDA; MAYOR WAYNE M. MESSAM, COMMISSIONER YVETTE COLBOURNE, COMMISSIONER WINSTON F. BARNES, and COMMISSIONER DARLINE B. RIGGS, each as elected officials of the City of Miramar, Florida;

CITY OF POMPANO BEACH, FLORIDA; and MAYOR LAMAR FISHER, as an elected official of the City of Pompano Beach, Florida;

VILLAGE OF PINECREST, FLORIDA; MAYOR JOSEPH M. CORRADINO, VICE-MAYOR CHERI BALL, COUNCILMEMBER ANNA HOCHKAMMER, COUNCILMEMBER DOUG KRAFT, and COUNCILMEMBER JAMES E. MCDONALD, each as elected officials of the Village of Pinecrest, Florida;

CITY OF SOUTH MIAMI, FLORIDA;

CITY OF MIAMI GARDENS, FLORIDA; MAYOR OLIVER G. GILBERT, III, VICE-MAYOR ERHABOR IGHODARO, PH.D., COUNCILMEMBER LISA C. DAVIS, COUNCILMEMBER RODNEY HARRIS, COUNCILMEMBER LILLIE Q. ODOM, COUNCILMEMBER FELICIA ROBINSON, and COUNCILMEMBER DAVID WILLIAMS, JR., each as elected officials of the City of Miami Gardens, Florida;

CITY OF MIAMI BEACH, FLORIDA; MAYOR DANIEL GELBER, COMMISSIONER MICKY STEINBERG, COMMISSIONER MARK SAMUELIAN, COMMISSIONER MICHAEL GÓNGORA, COMMISSIONER KRISTEN GONZALEZ, COMMISSIONER RICKY ARRIOLA, and COMMISSIONER JOHN ALEMÁN each as elected officials of the City of Miami Beach, Florida;

CITY OF CORAL GABLES, FLORIDA; and MAYOR RAUL VALDES-FAULI, as an elected official of the City of Coral Gables, Florida;

TOWN OF CUTLER BAY, FLORIDA; MAYOR PEGGY R. BELL, VICE MAYOR SUE LOYZELLE, COUNCILMEMBER MARY MIXON, COUNCILMEMBER MICHAEL CALLAHAN, and COUNCILMEMBER ROGER CORIAT, each as elected officials of the Town of Cutler Bay, Florida;

CITY OF LAUDERHILL, FLORIDA; and MAYOR RICHARD J. KAPLAN, as an elected official of the City of Lauderhill, Florida;

CITY OF BOCA RATON, FLORIDA;

TOWN OF SURFSIDE, FLORIDA; MAYOR DANIEL DIETCH, VICE MAYOR DANIEL GIELCHINSKY, COMMISSIONER MICHAEL KARUKIN, and COMMISSIONER TINA PAUL, each as elected officials of the Town of Surfside, Florida;

CITY OF TALLAHASSEE, FLORIDA; MAYOR ANDREW GILLUM, COMMISSIONER NANCY MILLER, and COMMISSIONER GIL ZIFFER, each as elected officials of the City of Tallahassee, Florida;

CITY OF NORTH MIAMI, FLORIDA;

CITY OF ORLANDO, FLORIDA; MAYOR BUDDY DYER, COMMISSIONER JIM GRAY, COMMISSIONER TONY ORTIZ, COMMISSIONER ROBERT F. STUART, COMMISSIONER PATTY SHEEHAN, COMMISSIONER REGINA I. HILL, and COMMISSIONER SAMUEL B. INGS, each as elected officials of the City of Orlando, Florida;

CITY OF FORT LAUDERDALE, FLORIDA;

CITY OF GAINESVILLE, FLORIDA; MAYOR LAUREN POE, COMMISSIONER HELEN WARREN, COMMISSIONER HARVEY WARD, COMMISSIONER DAVID ARREOLA, and COMMISSIONER ADRIAN HAYES-SANTOS, each as elected officials of the City of Gainesville, Florida;

CITY OF ST. PETERSBURG, FLORIDA; MAYOR RICK KRISEMAN, COUNCIL CHAIR LISA WHEELER-BOWMAN, COUNCILMEMBER CHARLIE GERDES, COUNCILMEMBER BRANDI GABBARD, COUNCILMEMBER DARDEN RICE, COUNCILMEMBER STEVE KORNELL, COUNCILMEMBER GINA DRISCOLL, and COUNCILMEMBER AMY FOSTER, each as elected officials of the City of St. Petersburg, Florida;

CITY OF MAITLAND, FLORIDA;

VILLAGE OF KEY BISCAYNE, FLORIDA; and

AMY TURKEL, a Resident of Miami Beach;

Plaintiffs,

vs.

THE HONORABLE RICHARD “RICK” SCOTT, in his official capacity as Governor of the State of Florida;

THE HONORABLE PAMELA JO BONDI, in her official capacity as Attorney General of the State of Florida;

THE HONORABLE ADAM H. PUTNAM, in his official capacity as Commissioner, Florida Department of Agriculture and Consumer Services;

THE HONORABLE RICK SWEARINGEN, in his official capacity as Commissioner, Florida Department of Law Enforcement;

THE HONORABLE SHERRILL F. NORMAN, in her official capacity as Auditor General of the State of Florida;

THE HONORABLE JIMMY PATRONIS, in his official capacity as Chief Financial Officer of the State of Florida; and

THE STATE OF FLORIDA,

Defendants.

AMENDED COMPLAINT FOR DECLARATORY RELIEF

Plaintiffs bring this action against Defendants for declaratory relief, and state as follows:

Overview

1. This is an action by numerous Florida municipalities, elected officials, and citizens (together, the "Plaintiffs") challenging the onerous, unconstitutional, and unprecedented penalties contained in section 790.33, Florida Statutes. The penalties are imposed whenever a municipality or its officials are found to have violated or impinged upon the State's purportedly exclusive occupation of the field of regulation of firearms and ammunition.

2. Normally, the enactment of a law in violation of express preemption will, at most, result in a declaration that the law is null and void. The penalty provisions of section 790.33 go

much further, threatening an official who violates section 790.33(1) with removal from office with no hearing and a civil fine of up to $5,000 that must be paid personally by the official. Additionally, public funds may not be used to defend the official. Further, the violation of section 790.33(1) can lead to unlimited lawsuits by any persons or organizations that claim to be "adversely affected" by the law, exposing the municipality to substantial damages and attorneys' fees. Finally, section 790.33(3)(b) specifically precludes the municipality from claiming good faith or reliance upon advice of counsel as a defense.

3. These onerous penalties are vindictive and expressly intended to be punitive in nature. *See* § 790.33(2), Fla. Stat. As a result, the penalties deter and chill officials from taking *any* actions in the area of firearms and ammunition, even in those areas where such actions are (or may be) allowed. *See, e.g.*, § 790.33(4), Fla. Stat.

4. The penalties are improper and must be declared null and void because they: (1) violate constitutional limitations on gubernatorial authority with respect to municipal officers; (2) conflict with the constitutional right of elected officials to legislative immunity in connection with their performance of legislative activities; (3) conflict with the constitutional right of municipalities to be immune from suit for discretionary functions; (4) are overbroad, in violation of local officials' free speech rights; (5) are unconstitutionally vague; (6) are irrational, arbitrary, and capricious; and (7) violate the right to petition and instruct local elected officials.

Jurisdiction and Venue

5. This is an action for declaratory relief, pursuant to Chapter 86, Florida Statutes, seeking to declare that the penalty provisions contained in section 790.33(3), Florida Statutes, are unconstitutional and invalid. The Court has jurisdiction to grant declaratory relief. *See* §§ 86.011, 86.021, 86.101, Fla. Stat.; *Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991).

6. Venue is proper in Leon County because the Defendants are all located in, or have their principal headquarters in, Leon County, Florida.

7. All conditions precedent to the institution of this lawsuit have been, or will be, satisfied or waived.

The Parties

8. The Municipal Plaintiffs are all incorporated municipalities existing under the laws of the State of Florida. The Elected Official Plaintiffs are all elected officials in those municipalities. Together, the Municipal Plaintiffs and Elected Official Plaintiffs consist of:

a. The Weston Plaintiffs. The CITY OF WESTON ("Weston") is a municipality existing under the laws of the State of Florida, and is located in Broward County, Florida. DANIEL J. STERMER is the duly elected Mayor of Weston. COMMISSIONERS MARGARET BROWN and BYRON L. JAFFE are duly elected Commissioners of Weston.

b. The Miramar Plaintiffs. The CITY OF MIRAMAR ("Miramar') is a municipality existing under the laws of the State of Florida, and is located in Broward County, Florida. WAYNE M. MESSAM is the duly elected Mayor of Miramar. COMMISSIONERS YVETTE COLBOURNE, WINSTON F. BARNES and DARLINE B. RIGGS are duly elected Commissioners of Miramar.

c. The Pompano Beach Plaintiffs. The CITY OF POMPANO BEACH ("Pompano Beach") is a municipality existing under the laws of the State of Florida, and is located in Broward County, Florida. LAMAR FISHER is the duly elected Mayor of Pompano Beach.

d. The Pinecrest Plaintiffs. The VILLAGE OF PINECREST ("Pinecrest") is a municipality existing under the laws of the State of Florida, and is located in Miami-Dade County, Florida. JOSEPH M. CORRADINO is the duly elected Mayor of Pinecrest. CHERI BALL is the duly elected Vice-Mayor of Pinecrest. COUNCILMEMBERS ANNA HOCHKAMMER, DOUG KRAFT, and JAMES E. MCDONALD are duly elected Councilmembers of Pinecrest.

e. The South Miami Plaintiff. The CITY OF SOUTH MIAMI ("South Miami") is a municipality existing under the laws of the State of Florida, and is located in Miami-Dade County, Florida.

f. The Miami Gardens Plaintiffs. The CITY OF MIAMI GARDENS ("Miami Gardens") is a municipality existing under the laws of the State of Florida, and is located in Miami-Dade County, Florida. OLIVER G. GILBERT, III, is the duly elected Mayor of Miami Gardens. ERHABOR IGHODARO, PH.D. is the duly elected Vice-Mayor of Miami Gardens. COUNCILMEMBERS LISA C. DAVIS, RODNEY HARRIS, LILLIE Q. ODOM, FELICIA ROBINSON and DAVID WILLIAMS, JR are duly elected Councilmembers of Miami Gardens.

g. The Miami Beach Plaintiffs. The CITY OF MIAMI BEACH ("Miami Beach") is a municipality existing under the laws of the State of Florida, and is located in Miami-Dade County, Florida. DANIEL GELBER is the duly elected Mayor of Miami Beach. COMMISSIONERS MICKY STEINBERG, MARK SAMUELIAN, MICHAEL GÓNGORA, KRISTEN GONZALEZ, RICKY ARRIOLA, and JOHN ALEMÁN are duly elected Commissioners of Miami Beach.

h. The Coral Gables Plaintiffs. The CITY OF CORAL GABLES ("Coral Gables") is a municipality existing under the laws of the State of Florida and is located in Miami-Dade County, Florida. RAUL VALDES-FAULI is the duly elected Mayor of Coral Gables.

i. The Cutler Bay Plaintiffs. The TOWN OF CUTLER BAY ("Cutler Bay") is a municipality existing under the laws of the State of Florida and is located in Miami-Dade County, Florida. PEGGY R. BELL is the duly elected Mayor of Cutler Bay. SUE LOYZELLE is the duly elected Vice Mayor of Cutler Bay. COUNCILMEMBERS MARY MIXON, MICHAEL CALLAHAN, and ROGER CORIAT are duly elected Councilmembers of Cutler Bay.

j. The Lauderhill Plaintiffs. The CITY OF LAUDERHILL ("Lauderhill") is a municipality existing under the laws of the State of Florida and is located in Broward County, Florida. RICHARD J. KAPLAN is the duly elected Mayor of Lauderhill.

k. The Boca Raton Plaintiff. The CITY OF BOCA RATON ("Boca Raton") is a municipality existing under the laws of the State of Florida and is located in Palm Beach County, Florida.

l. The Surfside Plaintiffs. The TOWN OF SURFSIDE ("Surfside") is a municipality existing under the laws of the State of Florida and is located in Miami-Dade County, Florida. DANIEL DIETCH is the duly elected Mayor of Surfside. DANIEL GIELCHINSKY is the duly elected Vice Mayor of Surfside. COMMISSIONERS MICHAEL KARUKIN and TINA PAUL are duly elected Commissioners of Surfside.

m. The Tallahassee Plaintiffs. The CITY OF TALLAHASSEE ("Tallahassee") is a municipality existing under the laws of the State of Florida and is located in Leon County, Florida. ANDREW GILLUM is the duly elected Mayor of Tallahassee. COMMISSIONERS NANCY MILLER and GIL ZIFFER are duly elected Commissioners of Tallahassee.

n. The North Miami Plaintiff. The CITY OF NORTH MIAMI ("North Miami") is a municipality existing under the laws of the State of Florida and is located in Miami-Dade County, Florida.

o. The Orlando Plaintiffs. The CITY OF ORLANDO ("Orlando") is a municipality existing under the laws of the State of Florida and is located in Orange County, Florida. BUDDY DYER is the duly elected Mayor of Orlando. COMMISSIONERS JIM GRAY, TONY ORTIZ, ROBERT F. STUART, PATTY SHEEHAN, REGINA I. HILL, and SAMUEL B. INGS are duly elected Commissioners of Orlando.

p. The Fort Lauderdale Plaintiffs. The CITY OF FORT LAUDERDALE ("Fort Lauderdale") is a municipality existing under the laws of the State of Florida and is located in Broward County, Florida.

q. The Gainesville Plaintiffs. The CITY OF GAINESVILLE ("Gainesville") is a municipality existing under the laws of the State of Florida and is located in Alachua County, Florida. LAUREN POE is the duly elected Mayor of Gainesville. COMMISSIONERS HELEN WARREN, HARVEY WARD, DAVID ARREOLA, and ADRIAN HAYES-SANTOS are duly elected Commissioners of Gainesville.

r. The St. Petersburg Plaintiffs. The CITY OF ST. PETERSBURG ("St. Petersburg") is a municipality existing under the laws of the State of Florida and is located in Pinellas County, Florida. RICK KRISEMAN is the duly elected Mayor of St. Petersburg. LISA WHEELER-BOWMAN is the duly elected Council Chair of St. Petersburg. COUNCILMEMBERS CHARLIE GERDES, BRANDI GABBARD, DARDEN RICE, STEVE KORNELL, GINA DRISCOLL, and AMY FOSTER are duly elected Councilmembers of St. Petersburg.

s. The Maitland Plaintiff. The CITY OF MAITLAND ("Maitland") is a municipality existing under the laws of the State of Florida and is located in Orange County, Florida.

t. The Key Biscayne Plaintiff. The VILLAGE OF KEY BISCAYNE is a municipality existing under the laws of the State of Florida and is located in Miami-Dade County, Florida.

9. Each of the Elected Official Plaintiffs performs legislative functions as part of his or her responsibilities as an elected representative, including, but not limited to, participating in public deliberations and voting on the adoption of ordinances and resolutions relating to the health, safety, and general welfare of the citizens of his or her respective municipality. Nearly all of the Elected Official Plaintiffs receive a salary from his or her respective municipality in compensation for his or her performance and services. Each Elected Official Plaintiff has taken an oath to uphold the Florida Constitution.

10. Each of the Municipal Plaintiffs is a municipality established pursuant to Article VIII, Section 2(a) of the Florida Constitution and is authorized to exercise home rule powers pursuant to Article VIII, Section 2(b) of the Florida Constitution.

11. The governing body for each of the Municipal Plaintiffs has discussed and affirmatively passed, by majority vote, motions and/or resolutions indicating that the Municipal Plaintiffs would consider firearms-related measures if not for the preemption statute and its penalties, and each of the Elected Official Plaintiffs voted for those resolutions.

12. The Elected Official Plaintiffs bring this lawsuit in defense of their actions taken in connection with the performance of their official duties, which serve a public purpose.

13. AMY TURKEL ("Turkel") was born and raised in Miami Beach and is currently a resident there. For many years, Turkel has been interested in local efforts to engage in the reasonable regulation of firearms in the City, including limitations relating to the use and possession of firearms in public facilities, like public parks. Whenever she has attempted recently to petition her elected officials on this issue, she has been told that any discussions on the subject would be futile since Florida law does not allow for any local efforts relating to regulation of firearms. As a result, her elected officials have on occasion been unwilling even to engage her in discussions relating to firearms.

14. THE HONORABLE RICHARD "RICK" SCOTT ("Scott") is the Governor of the State of Florida and is sued in his official capacity. Scott is a proper defendant in this action because the Governor is expressly designated as the official to enforce section 790.33(3)(e), Florida Statutes, regarding the removal from office of an official for violation of section 790.33(1), Florida Statutes. The Governor is also expressly designated in the Florida Constitution as the person who can initiate judicial proceedings against any county or municipal

officer to enforce compliance with any duty or to restrain any unauthorized act, including any alleged violations of section 790.33(1), Florida Statutes. *See* Art. 4, § 1(b), Fla. Const. The Governor's antagonistic position is further established by the fact that he signed into law the legislation that is now section 790.33, Florida Statutes, and challenged herein.

15. THE HONORABLE PAMELA JO BONDI ("Bondi") is the Attorney General of the State Florida and is sued in her official capacity. Bondi is a proper defendant in this action because the Attorney General is the chief law enforcement officer of the State and is expressly designated to enforce a portion of Chapter 790, to which the preemption and penalties in section 790.33 apply. Specifically, the Attorney General is designated to enforce the provisions that prohibit the registries and listing of gun owners, § 790.335(5)(c), Fla. Stat., and the provisions that relate to the right to bear arms in motor vehicles, § 790.251(6), Fla. Stat. The Attorney General also has the general right and authority to defend the constitutionality of state laws and, in fact, has intervened in at least one prior legal proceeding seeking to defend the validity of the preemption penalties found in section 790.33.

16. THE HONORABLE ADAM H. PUTNAM ("Putnam") is the Commissioner of the Florida Department of Agriculture and Consumer Services ("FDOACS") and is sued in his official capacity. Putnam is a proper defendant in this action because FDOACS is expressly designated to enforce and administer a portion of Chapter 790, to which the preemption and penalties in section 790.33 apply. Specifically, FDOACS is designated to enforce and administer the concealed weapons license regulations and program pursuant to section 790.06, Florida Statutes.

17. THE HONORABLE RICK SWEARINGEN ("Swearingen") is the Commissioner of the Florida Department of Law Enforcement ("FDLE") and is sued in his official capacity.

Swearingen is a proper defendant in this action because FDLE is expressly designated to enforce and administer a portion of Chapter 790 for which the preemption and penalties in section 790.33 apply. Specifically, FDLE is designated to enforce and administer the provisions related to the sale of firearms pursuant to section 790.65(1)(a), Florida Statutes.

18. THE HONORABLE SHERRILL F. NORMAN ("Norman") is the Auditor General of the State of Florida and is sued in her official capacity. Norman is a proper defendant in this action because, through her audit and review functions under section 11.45, Florida Statutes, the Auditor General is the official responsible for ensuring that municipalities do not use public funds for improper purposes. Thus, the Auditor General would be the responsible official to enforce the provision in section 790.33(3)(d), Florida Statutes, that prohibits the use of public funds to defend against or reimburse expenses incurred in defending an alleged violation of section 790.33(1), Florida Statutes.

19. THE HONORABLE JIMMY PATRONIS ("Patronis") is the Chief Financial Officer ("CFO") of the State of Florida and is sued in his official capacity. Patronis is a proper defendant in this action because the CFO is the official responsible for depositing and accounting for the fines issued and collected pursuant to section 790.33(3)(c), Florida Statutes.

20. THE STATE OF FLORIDA ("State of Florida") is a governmental entity, which, through its Legislature and Governor, adopted and enforces section 790.33, Florida Statutes. To the extent there is encompassed within section 790.33 a legitimate governmental interest in statewide uniformity of gun regulation, that interest belongs to and inures to the benefit of the State. Moreover, through the Attorney General, the State of Florida can defend the constitutionality of state laws and, in fact, has intervened in at least one prior legal proceeding seeking to defend the validity of the preemption penalties found in section 790.33.

21. Defendants Scott, Bondi, Putnam, and Patronis, collectively, also constitute the head of the Florida Department of Revenue and are being sued in that official capacity as well. The Florida Department of Revenue is the official State agency responsible for receiving the fines issued and collected pursuant to section 790.33(3)(c), Florida Statutes.

22. Defendants Scott, Bondi, Putnam, Swearingen, Norman, Patronis, and the State of Florida each have an actual, cognizable interest in this action for, among other things, the reasons stated above.

BACKGROUND

Home Rule Powers And Preemption Generally

23. Prior to 1968, Florida operated under "Dillon's Rule," which provided that municipalities only had those powers that were expressly given to them by the State.

24. This changed with the approval by the voters of the 1968 Florida Constitution, which gave broad home rule powers to municipalities in Article VIII, Section 2(b):

> Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law.

25. Consistent with the new home rule powers given to municipalities by Florida's electors, the Florida Legislature adopted the Home Rule Powers Act, which provided that "[t]he legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act, except . . . any subject expressly preempted to state or county government by the constitution or by general law." § 166.021(3), Fla. Stat.

26. The Plaintiffs do not dispute in this action the power of the State, generally, to preempt certain subject matters from regulation by municipalities. In fact, the State has

preempted several subject areas, including, *inter alia*, signs for gas stations and franchises, the activities and operations of pest control services, the operation of the state lottery, the use of electronic communication devices in motor vehicles, inter-district transfers of groundwater, mobile home lot rents, minimum wage, short-term rentals, plastic bags, and managed honeybee colonies. However, other than in connection with the firearm preemption that is the subject of this action, the State has never created legislation that would impose penalties on local officials and local governments for the violation of a preemption statute. In every other circumstance, the only consequence of a determination that local action violates express preemption would be a finding that such local action is null and void.

The Firearm Preemption

27. In 1987, the Legislature enacted the Joe Carlucci Uniform Firearms Act, which is codified in section 790.33, Florida Statutes. The statute was amended to its current version in 2011.

28. The general preemption of regulations of firearms and ammunition is set forth in section 790.33(1), Florida Statutes, and will be referred to hereafter as the "Firearm Preemption":

> PREEMPTION.—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 and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, 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. Any such existing ordinances, rules, or regulations are hereby declared null and void.

29. Notwithstanding the broad language of the Firearm Preemption, the Municipal Plaintiffs retain some authority to regulate and operate in the area of firearms and ammunition, as

well as in areas unrelated to firearm regulation that may affect the use and possession of firearms. Not only does this Firearm Preemption language not apply to regulations that are related to, but not necessarily encapsulated within, the field of firearms and ammunition itself, section 790.33 expressly incorporates exceptions to the Firearm Preemption. For example, section 790.33(1) does not prohibit: zoning ordinances that encompass firearms businesses; law enforcement agencies from enacting or enforcing regulations pertaining to firearms, ammunition, or firearm accessories issued to or used by peace officers in the course of their official duties; or any entity from regulating or prohibiting the carrying of firearms and ammunition by an employee of the entity during and in the course of the employee's official duties. § 790.33(4)(a)–(c), Fla. Stat. Additionally, there is a provision requiring local jurisdictions to enforce state firearm laws. § 790.33(2)(a), Fla. Stat.

30. Although the Municipal Plaintiffs and the Elected Official Plaintiffs are allowed (and in one case required) to act in the area of firearms and ammunition, the permissible actions are vague and ambiguous. For example, while the Firearm Preemption applies only to "ordinances and regulations," section 790.33(3)(a) also refers to "administrative rule[s]," and section 790.33(3)(f) suggests it may apply to any "measure, directive, rule, enactment, order or policy promulgated." Additionally, although the Firearm Preemption applies only to "firearms and ammunition," another section also mentions, but does not define, firearm "components." § 790.33(2)(a), Fla. Stat. Indeed, many of the terms in section 790.33 are not defined, leading to further uncertainty. Furthermore, although subsection 790.33(4)(a) contains a purported exception for zoning measures that "encompass firearms businesses along with other business," that language is also vague and ambiguous.

31. As a result of the conflicting and undefined terms, as well as the lack of clarity in section 790.33, municipal attorneys are unable to give assurances to municipalities and elected officials that any particular desired act relating to or impacting firearms is free of risk of being found to be preempted, even acts that the attorney's legal analysis would suggest are likely not preempted.

The Onerous Consequences For Impinging Upon Or Violating the Firearm Preemption

32. Normally, ambiguity in a preemption statute would not prevent a municipality or its elected officials from acting in accordance with the wishes of their constituents. They would, instead, in good faith and upon reliance of advice of counsel, engage in reasonable regulation despite the lack of certainty, knowing that the consequence of a legal determination of preemption would be limited to a finding that the regulation is null and void.

33. However, in 2011, penalties were specifically added to section 790.33 that apply to both individual elected officials and local governments. The Legislature's stated intent in imposing these penalties was to chill and deter local governments from taking *any* action at all that might affect firearms, even when such action might not be preempted. Section 790.33(2)(b) states:

> It is further the intent of this section 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.

34. In order to ensure that there would be no "abuse of official authority," onerous (and unprecedented) consequences were enacted for the violation or impingement of the Firearm Preemption (collectively, the "Onerous Preemption Penalties"), which also requires members of

the judicial branch of government to inquire into the hearts and minds of members of the legislative branch to determine whether the alleged violation was "knowing and willful":

a. Potential removal from office. Section 790.33(3)(e) provides that "[a] knowing and willful violation of any provision of this section by a person acting in an official capacity for any entity enacting or causing to be enforced a local ordinance or administrative rule or regulation prohibited under paragraph (a) or otherwise under color of law shall be cause for termination of employment or contract or *removal from office by the Governor*."

b. Potential civil fine. Section 790.33(3)(c) provides that "[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."

c. Prohibition on use of public funds for legal defense. Section 790.33(3)(d) provides that "[e]xcept as required by applicable law, public funds may not be used to defend or reimburse the unlawful conduct of any person found to have knowingly and willfully violated this section."

d. Potential civil liability for damages up to $100,000 and attorneys' fees. Section 790.33(3)(f) provides that "[a] person or an organization whose membership is *adversely affected* by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or caused to be enforced in violation of this section may file suit against any county, agency, municipality, district, or other entity in any court of this state having jurisdiction over any defendant to the suit for declaratory and injunctive relief and for *actual damages*, as limited herein,

caused by the violation." It further provides that "[a] court shall award the prevailing plaintiff in any such suit: 1. Reasonable attorney's fees and costs in accordance with the laws of this state, including a contingency fee multiplier, as authorized by law; and 2. The actual damages incurred, but not more than $100,000." In addition, pursuant to section 790.33(3)(b), "[i]t is no defense that in enacting the ordinance, regulation, or rule the local government was acting in good faith or upon advice of counsel." Thus, even a good faith, unintentional violation of the preemption statute, done upon advice of counsel, could still result in an unlimited number of lawsuits against a Plaintiff Municipality for damages and attorneys' fees.

The Desire, But Inability, Of Plaintiffs To Act In The Area Of Firearms

35. Over the past several years, there have been an unprecedented number of mass shootings in American communities, including at Marjory Stoneman Douglas High School in Parkland, Florida, on February 14, 2018. As a result, many students throughout the country, as well as many adults, have petitioned and instructed their elected officials, including the Elected Official Plaintiffs, to take some action regarding firearms and ammunition to increase public safety.

36. Consistent with their constitutional authority, the Elected Official Plaintiffs and Municipal Plaintiffs desire to take reasonable, constitutional actions relating to firearms and have considered a panoply of possible measures, including, but not limited to, the restricting of guns in municipal-owned facilities and parks, the placing of signs relating to guns in municipal-owned facilities and parks, the regulation of gun accessories (such as holsters or high capacity magazines), or the creation of "gun free zones" or "gun safe zones." These and other possible measures have been discussed by the Plaintiffs, but the attorneys for the Plaintiffs have warned

them about the risk of the Onerous Preemption Penalties, even as to measures that are likely not preempted by the Firearm Preemption, but could nonetheless result in costly litigation, the cost of which would be largely borne by the elected officials personally.

37. The Municipal and Elected Official Plaintiffs have also been threatened with the Onerous Preemption Penalties to the extent they seek to enact, promulgate, or enforce any regulation relating to firearms or ammunition. For example, when the Coral Gables Plaintiffs considered enacting certain firearm-related measures and took a preliminary vote in February 2018 in favor of passing one such measure, a gun rights organization emailed the Coral Gables City Attorney through its general counsel. In the email, the organization's lawyer reminded the City Attorney about a recent lawsuit in which the organization had sued a different Florida city (and several of that city's employees) over a zoning measure that related to firearms. In addition to that warning by the gun rights organization, a member of the public told the Coral Gables Plaintiffs that he would sue if the city passed the proposed gun-related measures, and he also told the Coral Gables Mayor that he will "urge Governor Scott to remove you from office and fine you individually as permitted under Florida statutes."

38. Because of the actual and imminent threat of the imposition of the Onerous Preemption Penalties, the Elected Official Plaintiffs and Municipal Plaintiffs are uncertain as to their rights and responsibilities and fear taking any action that could even remotely be viewed as a violation of the Firearm Preemption.

39. Accordingly, the Municipal and Elected Official Plaintiffs have suspended or refrained from consideration of reasonable firearms measures that express the political views of the Municipal Plaintiffs and their citizens, including Turkel, and which may be appropriate for the specific circumstances of that municipality (as opposed to the "one size fits all" approach of

the State), thus making the constitutionality of the penalties an issue that is capable of repetition, yet evading review. In short, the Onerous Preemption Penalties have created the intended chilling effect upon taking any action and preventing the Plaintiffs from responding to the petitions and requests of their constituents relating to firearms.

40. The Onerous Preemption Penalties and the ambiguities in section 790.33 prevent the Elected Official Plaintiffs from complying with their duties under the statute and interfere with their ability to regulate firearms in ways that fall within the exceptions in the statute.

Expedited Consideration

41. Section 86.111, Florida Statutes, provides for expedited consideration of actions for declaratory relief, and the Plaintiffs hereby request such consideration.

COUNT I

VIOLATION OF CONSTITUTIONAL LIMITATIONS ON GUBERNATORIAL AUTHORITY WITH RESPECT TO MUNICIPAL OFFICERS
(Elected Official Plaintiffs Against Defendant Scott)

42. The Elected Official Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 41 inclusive, as if fully set forth herein.

43. This count is an action for declaratory judgment, pursuant to section 86.011, *et. seq.*, Florida Statutes, seeking a declaration from the Court that the removal penalty provided for in section 790.33(3)(e), Florida Statutes, violates the constitutional limitations on the Governor's authority to remove municipal elected officials from office.

44. The authority of the Governor vis-à-vis duly elected municipal officials is circumscribed by the Florida Constitution, and the Legislature lacks the authority to expand the Governor's authority through section 790.33(3)(e), which purports to allow the Governor to remove from office "any person acting in an official capacity for any entity enacting or causing

to be enforced a local ordinance or administrative rule or regulation prohibited under paragraph (a)," if that official violated the Firearm Preemption in a "knowing and willful" manner.

45. Article IV, Section 7(c) of the Florida Constitution provides that "[b]y order of the governor, any elected municipal officer *indicted for crime* may be *suspended* from office until acquitted and the office filled by appointment for the period of suspension, not to extend beyond the term, unless these powers are vested elsewhere by law or the municipal charter." (emphasis added).

46. There is, however, no constitutional authority for the Governor to remove from office any municipal elected official simply because that individual knowingly and willfully violated the Firearm Preemption. Even a knowing and willful violation of the Firearm Preemption is not tantamount to an indictment for committing a crime. Moreover, the constitutional authority conferred by Article IV, Section 7(c) merely provides for the *suspension* of the indicted municipal official, not his or her automatic and permanent removal.

47. In fact, the Governor's authority to remove a county official pursuant to section 790.33(3)(e), Florida Statutes, has already been stricken as unconstitutional because the purported statutory authority exceeded the Governor's constitutional authority to suspend county officials pursuant to Article IV, Section 7 of the Florida Constitution. *Marcus v. Scott*, 2014 WL 3797314 (Fla. 2d Jud. Cir. June 2, 2014).

48. The court's reasoning in *Marcus* is instructive here:

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

> *Civil Rights*, 306 So. 2d 520, 523 (Fla. 1975) (holding that a constitutional prescription of the manner in which an action should be taken is a prohibition against a different manner of taking the action); *Bruner v. State Commission on Ethics*, 384 So. 2d 1339, 1340-41 (Fla. 1st DCA 1980) (holding that the Florida Legislature may not vary from the constitutional allocation of power in the gubernatorial suspension of public officials). *In re Advisory Opinion of Governor Civil Rights*, at p. 523 stated: "The principle is well established that, where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. 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." (citations omitted) "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."* (Emphasis Supplied).

49. As such, the Court should declare that section 790.33(3)(e), as applied to the Elected Official Plaintiffs, is invalid and unconstitutional.

50. All elements necessary to support a cause of action for declaratory relief are present:

a. There is a bona fide, actual, present need for a declaration that section 790.33(3)(e), Florida Statutes, is invalid and unconstitutional.

b. The declaration sought deals with a present controversy as to an ascertainable set of facts.

c. Constitutionally provided rights and privileges of the Plaintiffs are dependent upon the law applicable to the facts.

d. The Plaintiffs and the Defendants have an actual, present, adverse, and antagonistic interest in the subject matter of this Complaint.

e. The antagonistic and adverse interests are all before this Court.

f. The relief sought is not merely the giving of legal advice or providing the answer to a question propounded from curiosity, but stems from an actual controversy.

Prayer for Relief

WHEREFORE, the Elected Official Plaintiffs respectfully request that judgment be entered in their favor:

A. Declaring that section 790.33(3)(e), Florida Statutes, is unconstitutional; and

B. Granting such other relief as this Court deems just and proper.

COUNT II

VIOLATION OF LEGISLATIVE IMMUNITY AND SEPARATION OF POWERS
(Elected Official Plaintiffs Against All Defendants)

51. The Elected Official Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 41 inclusive, as if fully set forth herein.

52. This count is an action for declaratory judgment, pursuant to section 86.011, *et. seq.*, Florida Statutes, seeking a declaration from the Court that the Onerous Preemption Penalties applicable to the Elected Official Plaintiffs, as provided for in sections 790.33(3)(a), (c), (d), and (e), Florida Statutes, violate the Elected Official Plaintiffs' well-settled right to legislative immunity in the enactment of legislation.

53. Among the Onerous Preemption Penalties are two punitive provisions that specifically target individual elected officials for actions taken in their purely legislative capacities: (1) the possibility of a $5,000 fine; and (2) removal from office by the Governor upon a finding that the elected official violated the Firearm Preemption in a "knowing and willful" manner.

54. Additionally, section 790.33(d) precludes the expenditure of any public funds to defend the elected official or reimburse the elected official if that official's conduct is found to

be "knowing and willful," thereby requiring the elected official to use personal funds to pay attorneys for his or her defense.

55. The "knowing and willful" components of section 790.33(3) necessarily require an inquiry into the motives and intent of the elected official in voting as he or she did, in order to potentially punish that local legislator for such a vote.

56. Such an inquiry is an invasion of the legislative immunity afforded to elected officials when acting within the sphere of legitimate legislative activity.

57. The concept of legislative immunity is a fundamental component of American democracy. As the United States Supreme Court has observed:

> The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo–American law. This privilege has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries and was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation.
>
> * * *
>
> Because the common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government, and because the rationales for such immunity are fully applicable to local legislators, we now hold that local legislators are likewise absolutely immune from suit … for their legislative activities.

Bogan v. Scott-Harris, 523 U.S. 44 (1998) (internal quotation marks and citations omitted). As the *Bogan* Court further explained, "Absolute immunity for local legislators … finds support not only in history, but also in reason.… '[A]ny restriction on a legislator's freedom undermines the "public good" by interfering with the rights of the people to representation in the democratic process.'" *Id*. at 52 (quoting *Spallone v. United States*, 493 U.S. 265, 279 (1990)).

58. "Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace.

. . . And the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability." *Id.* (citing *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951), and *Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982)).

59. "Absolute legislative immunity attaches to all actions taken 'in the sphere of legitimate legislative activity.'" *Id.* at 54 (citing *Tenney*, *supra*, at 376). Any inquiry into the motivations or intent of local legislators, therefore, is prohibited. *Id.* at 55 ("Furthermore, it simply is 'not consonant with our scheme of government for a court to inquire into the motives of legislators.'" (quoting *Tenney*, 341 U.S. at 377)). The threat of proceedings against the Elected Official Plaintiffs, whether for monetary or injunctive relief, "creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Supreme Court of Va. V. Consumers Union of U.S., Inc.*, 445 U.S. 719, 733 (1980) (quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975)).

60. The Florida Supreme Court has echoed the importance of legislative immunity in its own jurisprudence. In *McNayr v. Kelly*, 184 So. 2d 428 (Fla. 1966), the Florida Supreme Court, citing federal precedents, first expressly acknowledged the absolute privilege from liability that elected officials enjoy for conduct in their official capacities, and stressed its critical role:

> The justification for [the immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.
>
> * * *
>
> In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation.

Id. at 431 n. 12. Since *McNayr*, other Florida courts, citing *McNayr* and U.S. Supreme Court precedents like *Tenney*, have reaffirmed the application of legislative immunity to local legislators and concluded that the scope of the immunity must be broadly construed. *See, e.g.*, *Prins v. Farley*, 208 So. 3d 1215 (Fla. 1st DCA 2017); *City of Pompano Beach v. Swerdlow Lightspeed Mgmt. Co., LLC*, 942 So. 2d 455 (Fla. 4th DCA 2006); *P.C.B. P'ship v. City of Largo*, 549 So. 2d 738 (Fla. 2d DCA 1989).

61. Florida courts have also concluded that legislative immunity has independent roots in the Florida Constitution's separation of powers doctrine. *See Florida House of Representatives v. Expedia, Inc.*, 85 So. 3d 517, 524 (Fla. 1st DCA 2012) (recognizing that legislative privilege, which derives from legislative immunity, "exists by virtue of the separation of powers provision of the Florida Constitution"); *see also Wallace v. Dean*, 3 So. 3d 1035, 1045 (Fla. 2009) ("[W]e take this occasion to reaffirm that, in Florida, governmental immunity derives entirely from the doctrine of separation of powers, not from . . . any statutory basis." (citations and quotations marks omitted)). Florida's separation of powers doctrine is set forth in Article II, section 3 of the Florida Constitution: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The doctrine in Florida has been applied to maintain a *strict* separation of powers. *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).

62. The First District explained:

> The importance of this provision cannot be overstated. Our supreme court described the separation of powers as "the cornerstone of American democracy." … The 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 or to describe their process of gathering

> information on a bill. Our 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 525.

63. The Onerous Preemption Penalties, as applied to the Elected Official Plaintiffs, breach the strict separation of powers doctrine by specifically authorizing the judiciary to inquire into the motivations and intent of local legislators to determine whether they knowingly and willfully violated the Firearm Preemption. This is precluded by binding precedent and threatens "the cornerstone of American democracy."

64. The Legislature was well aware that its enactment of the Onerous Preemption Penalties targeting local elected officials would potentially eviscerate legislative immunity and undermine the principles of democratic representation. *See* Staff Final Bill Analysis, Bill #: CS/CS/CS/HB 45 ("Bill Analysis"). The Bill Analysis expressly states:

> The general rule under the common law is that legislators enjoy absolute immunity from liability for performance of legislative acts. Absolute immunity for legislators has historically been recognized as a "venerable tradition" which has withstood the development of the law since pre-colonial days. Courts have upheld absolute immunity for legislators at all levels of law-making, including federal, state, and local government levels. The courts' reasoning behind such holdings is that when legislators hold legislative powers, they use them for the public good, and are exempt from liability for mistaken use of their legislative powers. Furthermore, courts fear that allowing personal liability could distort legislative discretion, undermine the public good by interfering with the rights of the people to representation, tax the time and energy of frequently part-time citizen-legislators, and deter service in local government.

Id. at 4 (footnotes omitted). The Bill Analysis further recognized that notwithstanding legislative immunity, citizens retain the legal remedy of challenging preempted ordinances and obtaining declaratory and injunctive relief to prevent enforcement of preempted local laws. *Id.*

65. And yet, despite the Bill Analysis' recognition of the critical significance of legislative immunity, the Legislature imposed the Onerous Preemption Penalties on individual

elected officials, based entirely on an inquiry into the elected officials' motivation in enacting local legislation.

66. The Bill Analysis' only basis for attempting to penalize the Elected Official Plaintiffs despite an immunity that the Bill Analysis recognizes as "a 'venerable tradition,' which has withstood the development of the law since pre-colonial days," is that "[a]rguably, an express and clear preemption would remove discretion from local government officials seeking to engage in lawmaking in the preempted field." Bill Analysis at 4. The reasoning underlying this approach is that the Legislature's preemption would make the enactment of local legislation and the voting of elected officials into "ministerial" acts. *Id.*

67. The adoption of ordinances and resolutions are not, however, ministerial acts. Lawmaking, such as the adoption of ordinances and resolutions, requires the exercise of discretion in balancing the costs of the proposed legislation against the legislation's relative benefits. "Voting for an ordinance" is "quintessentially legislative" conduct. *Bogan*, *supra*, at 55.

68. Furthermore, the question of whether a particular legislative act runs afoul of the Firearm Preemption can be determined only after review by a court, considering the express language of the preemption itself and any other general laws relating to gun regulation.

69. Given the variety of statutory and constitutional provisions affecting local firearms and ammunition regulation, the sphere of legitimate local activity in this field is not clearly defined. Rather, the development of some policies in the field of regulation of firearms and ammunition is clearly within the province of local governments, who serve closest to the people who are actually affected by gun violence. If states are the laboratories of our democracy, municipalities are the scientists. Local governments are where democracy flourishes in its truest

and most accessible sense. As issues relating to gun activity develop and evolve in particular jurisdictions, the Elected Official Plaintiffs can, should, and desire to react accordingly and in the best interest of the local community.

70. The electoral process, which allows for removal of elected officials, and the ability and duty of the judiciary to declare preempted legislation null and void, are fully adequate "checks" on the Elected Official Plaintiffs. The punitive provisions of section 790.33 are unnecessary and unconstitutional.

71. As such, the Court should declare section 790.33(3), Florida Statutes, invalid and unconstitutional.

72. Based on the foregoing, all elements necessary to support a cause of action for declaratory relief are present:

a. There is a bona fide, actual, present need for a declaration that the Onerous Preemption Penalties are invalid and unconstitutional.

b. The declaration sought deals with a present controversy as to an ascertainable set of facts.

c. Constitutionally provided rights and privileges of the Elected Official Plaintiffs are dependent upon the law applicable to the facts.

d. The Plaintiffs and the Defendants have an actual, present, adverse, and antagonistic interest in the subject matter of this Complaint.

e. The antagonistic and adverse interests are all before this Court.

f. The relief sought is not merely the giving of legal advice or providing the answer to a question propounded from curiosity, but stems from an actual controversy.

Prayer for Relief

WHEREFORE, the Elected Official Plaintiffs respectfully request that judgment be entered in their favor:

A. Declaring that sections 790.33(3)(a)–(e), Florida Statutes, are unconstitutional; and

B. Granting such other relief as this Court deems just and proper.

COUNT III

VIOLATION OF GOVERNMENTAL FUNCTION IMMUNITY
(Municipal Plaintiffs Against All Defendants)

73. The Municipal Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 41 inclusive, as if fully set forth herein.

74. This count is an action for declaratory judgment, pursuant to section 86.011, *et. seq.*, Florida Statutes, seeking a declaration from the Court that section 790.33(3)(f), Florida Statutes, is invalid because it violates the discretionary governmental immunity of the Municipal Plaintiffs by creating a strict liability cause of action for damages (up to $100,000), not inclusive of attorneys' fees and costs, against municipalities for performing the discretionary governmental act of enacting or enforcing ordinances or regulations. The Municipal Plaintiffs face liability even if their officials acted in good faith and in reliance on counsel.

75. Under Florida law, there are certain policy-making, planning, or judgmental governmental functions that are inherent in the act of governing and therefore ought not to be subjected to scrutiny by judge or jury because it would inappropriately entangle the courts in fundamental questions of planning and policy. *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010 (Fla. 1979).

76. Notwithstanding the Legislature's enactment in section 768.28, Florida Statutes, of a limited waiver of sovereign immunity for tort actions against local governments (up to specified monetary caps), the Florida Supreme Court has held that "even absent an express exception in section 768.28 for discretionary functions, certain policy-making, planning or judgmental governmental functions cannot be the subject of traditional tort liability." *Id.* at 1020.

77. "Accordingly, where governmental actions are deemed discretionary, as opposed to operational, the government has absolute immunity from suit." *City of Freeport v. Beach Community Bank*, 108 So. 3d 684 (Fla. 1st DCA 2013).

78. The decision of a municipality's governing body to enact an ordinance or regulation is quintessential discretionary conduct. It involves the determination of governmental policy and objective; is an essential step in the accomplishment of the policy or objective; requires the exercise of basic policy evaluation and judgment on the part of the government; and is within the lawful authority and duty of the governing body. *Trianon Park Condo. Ass'n v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985).

79. Even if a Court were to ultimately determine that a local government and its municipal attorney were incorrect and enacted an ordinance that violated the Firearm Preemption, the decision to enact the ordinance was still a discretionary function that is protected by absolute immunity.

80. As such, the Court should declare section 790.33(3)(f), Florida Statutes, invalid and unconstitutional.

81. All elements necessary to support a cause of action for declaratory relief are present:

a. There is a bona fide, actual, present need for a declaration that section 790.33(3)(f), Florida Statutes, is invalid and unconstitutional.

b. The declaration sought deals with a present controversy as to an ascertainable set of facts.

c. Constitutionally provided rights and privileges of the Plaintiffs are dependent upon the law applicable to the facts.

d. The Plaintiffs and the Defendants have an actual, present, adverse, and antagonistic interest in the subject matter of this Complaint.

e. The antagonistic and adverse interests are all before this Court.

f. The relief sought is not merely the giving of legal advice or providing the answer to a question propounded from curiosity, but stems from an actual controversy.

Prayer for Relief

WHEREFORE, the Municipal Plaintiffs respectfully request that judgment be entered in their favor:

A. Declaring that section 790.33(3)(f), Florida Statutes, is unconstitutional; and

B. Granting such other relief as this Court deems just and proper.

COUNT IV

VIOLATION OF RIGHT TO FREE SPEECH DUE TO OVERBREADTH
(Municipal Plaintiffs, Elected Official Plaintiffs, And Turkel Against All Defendants)

82. The Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 41 inclusive, as if fully set forth herein.

83. This count is an action for declaratory judgment, pursuant to section 86.011, *et. seq.*, Florida Statutes, seeking a declaration from the Court that section 790.33(3)(f), Florida

Statutes, is unconstitutional on grounds of overbreadth. Such overbreadth results in an infringement of the Elected Official Plaintiffs' free speech rights secured by Article I, Section 4 of the Florida Constitution.

84. Section 790.33(3)(f) states, in pertinent part, "A person or an organization whose membership is adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy *promulgated* or caused to be enforced in violation of this section may file suit against any … municipality[.]"

85. The term "promulgate" is defined in various ways:

1. to make (something, such as a doctrine) known by open declaration; proclaim
2. to make known or public the terms of (a proposed law)
3. to put (a law) into action or force

See https://www.merriam-webster.com/dictionary/promulgate; *see also Black's Law Dictionary* (10th ed. 2014). The statute does not specify which of these potential definitions governs the potential liability of a municipality under section 790.33(3)(f). However, the first two definitions immediately demonstrate the vagueness and over-breadth problems with the statute.

86. While case law suggests that elected officials do not typically enjoy constitutional free speech protection when merely *casting a vote* in their elected, representative capacities, they do, however, enjoy free speech rights when advocating on behalf of particular public policies. The Elected Official Plaintiffs frequently address their colleagues and members of the public from the dais on issues of great public significance, including potential firearm regulation. In doing so, they certainly "make (something, such as a doctrine) known by open declaration" or "proclamation." They just as frequently "make known or public the terms of a *proposed* law," even if that law is never ultimately enacted.

87. Because the Legislature's use of the term "promulgate" is overbroad, it is virtually impossible for any elected official to know when his or her protected free speech crosses the line into "promulgation" that might give rise to significant municipal and personal liability. This uncertainty infringes upon the free speech rights of the Elected Official Plaintiffs and works to deter them from engaging even in simple, constitutionally protected advocacy of a political position. Furthermore, the overbreadth of the term "promulgate" purports to make speech that is unquestionably protected by the Florida Constitution subject to state-sanctioned strict liability.

88. The Municipal Plaintiffs similarly are deterred from encouraging public discourse at public meetings for fear that such discourse might lead their elected officials to "promulgate" views that contravene the preemption endorsed by the Legislature. In fact, the Bill Analysis expressly acknowledged that the penalty provision found in section 790.33(f) will have a negative fiscal impact on municipalities and that any damages awarded could even be satisfied "by seizure of municipal property." Bill Analysis at 4, 7.

89. Additionally, the statute is overbroad in that it restricts the protected speech and conduct of the electorate, including Turkel, who desire to promote positive change in their own communities. Indeed, the very existence of the Onerous Preemption Penalties causes constituents like Turkel to refrain from constitutionally protected speech or expression with their elected officials out of fear that their public comments could lead to severe sanctions against the very municipality they seek to improve, not to mention the local leaders who serve them. As a result, a substantial amount of protected speech concerning the regulation of firearms and ammunition is effectively prohibited or chilled in the process.

90. As such, the Court should declare section 790.33(3)(f), Florida Statutes, invalid and unconstitutional.

91. All elements necessary to support a cause of action for declaratory relief are present:

a. There is a bona fide, actual, present need for a declaration that section 790.33(3)(f), Florida Statutes, is invalid and unconstitutional.

b. The declaration sought deals with a present controversy as to an ascertainable set of facts.

c. Constitutionally provided rights and privileges of the Plaintiffs are dependent upon the law applicable to the facts.

d. The Plaintiffs and the Defendants have an actual, present, adverse and antagonistic interest in the subject matter of this Complaint.

e. The antagonistic and adverse interests are all before this Court.

f. The relief sought is not merely the giving of legal advice or providing the answer to a question propounded from curiosity, but stems from an actual controversy.

Prayer for Relief

WHEREFORE, the Plaintiffs respectfully request that judgment be entered in their favor:

A. Declaring that section 790.33(3)(f), Florida Statutes, is unconstitutional; and

B. Granting such other relief as this Court deems just and proper.

COUNT V

VIOLATION OF RIGHT TO DUE PROCESS DUE TO VAGUENESS
(Elected Official Plaintiffs Against All Defendants)

92. The Elected Official Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 41 inclusive, as if fully set forth herein.

93. This count is an action for declaratory judgment, pursuant to section 86.011, *et. seq.*, Florida Statutes, seeking a declaration from the Court that the Onerous Preemption Penalties in section 790.33, Florida Statutes, are void for vagueness.

94. In a penal statute, the Due Process Clause of the Florida Constitution, Article I, Section 9, requires the use of language that is sufficiently definite to provide fair notice to individuals who may be affected of what conduct is prohibited.

95. Section 790.33 fails to give adequate notice of what conduct is prohibited. It appears to proscribe municipalities and their elected officials from enacting or causing to be enforced any local ordinance or administrative rule or regulation "impinging" upon the Legislature's "exclusive occupation of the field of regulation of firearms and ammunition." However, this section is riddled with ambiguity. For example, while the Firearm Preemption applies only to "ordinances and regulations," section 790.33(3)(a) also refers to "administrative rule[s]," and section 790.33(f) suggests it may apply to any "measure, directive, rule, enactment, order or policy promulgated." Additionally, although the Firearm Preemption applies only to "firearms and ammunition," another section also mentions, but does not define, firearm "components." § 790.33(2)(a), Fla. Stat.

96. This language of section 790.33 is so vague and so broad that a person of common intelligence must speculate about its meaning and be subjected to punishment if the

guess is wrong. Further, because of its imprecision, section 790.33 necessarily invites arbitrary and discriminatory enforcement.

97. Section 790.33 is a penal statute in that it imposes effectively criminal punishment against the Elected Official Plaintiffs. It has a "knowing and willful" scienter or *mens rea* requirement. When the scienter requirement is met, the Elected Official Plaintiffs may be fined up to $5,000 and removed from office, and the Elected Official Plaintiffs may not use public funds in their defense.

98. The Elected Official Plaintiffs have property rights in continued employment as elected officials. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985); *McRae v. Douglas*, 644 So. 2d 1368, 1372–73 (Fla. 5th DCA 1994). The Elected Officials also have property rights in the use of their private funds.

99. The purpose and intent of the Onerous Preemption Penalties are punishment, retribution, and deterrence.

100. As such, the Court should declare section 790.33, Florida Statutes, invalid and unconstitutional.

101. All elements necessary to support a cause of action for declaratory relief are present:

a. There is a bona fide, actual, present need for a declaration that section 790.33, Florida Statutes, is invalid and unconstitutional.

b. The declaration sought deals with a present controversy as to an ascertainable set of facts.

c. Constitutionally provided rights and privileges of the Plaintiffs are dependent upon the law applicable to the facts.

d. The Plaintiffs and the Defendants have an actual, present, adverse, and antagonistic interest in the subject matter of this Complaint.

e. The antagonistic and adverse interests are all before this Court.

f. The relief sought is not merely the giving of legal advice or providing the answer to a question propounded from curiosity, but stems from an actual controversy.

Prayer for Relief

WHEREFORE, the Elected Official Plaintiffs respectfully request that judgment be entered in their favor:

A. Declaring that section 790.33, Florida Statutes, is unconstitutional; and

B. Granting such other relief as this Court deems just and proper.

COUNT VI

VIOLATION OF THE PROHIBITION ON ARBITRARY AND CAPRICOUS LAWS AND LAWS THAT LACK A RATIONAL BASIS
(Municipal Plaintiffs And Elected Official Plaintiffs Against All Defendants)

102. The Municipal And Elected Official Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 41 inclusive, as if fully set forth herein.

103. This count is an action for declaratory judgment, pursuant to section 86.011, *et. seq.*, Florida Statutes, seeking a declaration from the Court that section 790.33(3), Florida Statutes, is invalid because it treats the violation of the preemption of local government regulation of firearms differently than violations of other preempted subject areas and gives more protection to the newly created right against local regulation of firearms than to any other rights (even those set forth in the Florida Constitution), all with no rational basis. This Count also seeks a declaratory judgment that section 790.33(3), and the application of the general

preemption of local firearm regulation contained in section 790.33(1) to the regulation of firearms by a municipality on municipal-owned property, are invalid because they arbitrarily and capriciously treat municipal-owned property differently than privately owned property, with no rational or reasonable basis to distinguish between the two.

104. Under Florida law, all statutes must, at a minimum, have a rational basis and must not be arbitrary and capricious. *See Dept. of Corrections v. Fla. Nurses Ass'n*., 508 So. 2d 317, 319 (Fla. 1987). This requirement is rooted in doctrines of equal protection and due process, as well as Article III, Section 11(b) of the Florida Constitution ("In the enactment of general laws on other subject, political subdivisions or other governmental entities may be classified only on a basis reasonably related to the subject of the law."); *see also Goodman v. Martin County Health Dept.*, 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.").

105. Under Section 790.33(3), individual elected officials who vote for an ordinance in violation of the Firearm Preemption are subject to severe consequences (removal from office and civil fines), while individual elected officials who vote for an ordinance in violation of other state preemptions (or even in violation of other state constitutional rights) are not. Similarly, municipalities that enact ordinances in violation of the Firearm Preemption are subjected to lawsuits from all adversely affected persons and organizations and to damages up to $100,000, plus attorneys' fees, while municipalities that enact ordinances in violation of other state preemptions (or even in violation of state constitutional rights) are not.

106. There is no rational basis for such disparate treatment. The concept of preemption is of equal importance regardless of the subject matter of the preemption, and the consequences for violation should be the same. The consequence of a violation of the Firearm Preemption was,

until the enactment of the Onerous Preemption Penalties in 2011, always the same as a violation of any other preemption statute—a declaration that the preempted ordinance is invalid. The creation of different consequences for a preemption violation is arbitrary and capricious and has no rational basis.

107. In essence, the Onerous Preemption Penalties create a private right to be free from local governmental regulation of firearms, and then makes that right sacrosanct and elevates and protects it more than even the core constitutional rights declared in Article 1 of the Florida Constitution (including the right of equal protection, religious freedom, freedom of speech, freedom of the press, due process, etc.), by creating severe penalties for the violation of only that right.

108. In addition, under Florida law, private property owners are permitted to pass and enforce "rules" relating to firearms and ammunitions on their property. However, pursuant to section 790.33(1), Florida Statutes, local government property owners may not do so.

109. The Municipal Plaintiffs have the same interest as private property owners in keeping their government-owned premises, visitors, and employees safe. Elsewhere in Chapter 790, the State recognized this important interest by exempting the possession of a concealed firearm at any meeting of the governing body of a municipality by an individual who is otherwise licensed to carry a concealed firearm. § 790.06(12)(a)(7), Fla. Stat. However, prior to the meeting, as soon as the meeting is over, and every other day of the week, the employees of a municipality who are clearly deserving of protection are again subject to the potential danger posed by firearms.

110. The Municipal and Elected Official Plaintiffs, like many private property owners throughout the State, desire to enact and enforce rules related to firearms and ammunition on

their property that do not conflict with the fundamental right to bear arms, but that provide for more uniform protection and safety of property, visitors, and employees.

111. Section 790.33(1), taken together with other Florida Statutes, creates a classification scheme treating local government property owners differently than private property owners with no reasonable relationship to the purpose of the law. There is no rational basis for treating local governments who seek to impose limitations on the use of firearms and ammunition on their property differently from private entities who seek to do so on their privately owned property.

112. As such, the Court should declare section 790.33(3), Florida Statutes, and the application of the general preemption of local firearm regulation contained in section 790.33(1) to the regulation of firearms by a municipality on municipally owned property, invalid and unconstitutional.

113. All elements necessary to support a cause of action for declaratory relief are present:

a. There is a bona fide, actual, present need for a declaration that the Onerous Preemption Penalties contained in section 790.33(3), Florida Statutes, are invalid, and unconstitutional, and that the application of the general preemption of local firearm regulation contained in section 790.33(1) to the regulation by the Plaintiffs of firearms on municipally owned property, and the imposition of the Onerous Preemption Penalties for the enactment of such regulation, are also invalid and unconstitutional.

b. The declaration sought deals with a present controversy as to an ascertainable set of facts.

c. Constitutionally provided rights and privileges of the Plaintiffs are dependent upon the law applicable to the facts.

d. The Plaintiffs and the Defendants have an actual, present, adverse and antagonistic interest in the subject matter of this Complaint.

e. The antagonistic and adverse interests are all before this Court.

f. The relief sought is not merely the giving of legal advice or providing the answer to a question propounded from curiosity, but stems from an actual controversy.

Prayer for Relief

WHEREFORE, the Municipal and Elected Official Plaintiffs respectfully request that judgment be entered in their favor:

a. Declaring that section 790.33(3), Florida Statutes, is unconstitutional;

b. Declaring that section 790.33(3), and the application of the general preemption of local firearm regulation contained in section 790.33(1) to the regulation of firearms by a municipality on municipally owned property, are unconstitutional; and

c. Granting such other relief as this Court deems just and proper.

COUNT VII

VIOLATION OF RIGHT TO PETITION AND INSTRUCT
(Municipal Plaintiffs, Elected Official Plaintiffs, And Turkel Against All Defendants)

114. The Plaintiffs reallege and incorporate by reference the allegations contained in paragraphs 1 through 41 inclusive, as if fully set forth herein.

115. This count is an action for declaratory judgment, pursuant to section 86.011, *et. seq.*, Florida Statutes, seeking a declaration from the Court that the Onerous Preemption Penalties applicable to the Elected Official Plaintiffs, as provided for in sections 790.33(3)(a),

(c), (d), and (e), Florida Statutes, violate Article I, Section 5 of the Florida Constitution by rendering illusory the rights of residents living in the Municipal Plaintiffs to petition and instruct their elected representatives.

116. Article I, Section 5 of the Florida Constitution reads as follows: "**Right to assemble.** – The people shall have the right peaceably to assemble, to instruct their representatives, and to petition for redress of grievances." The Florida Supreme Court has characterized the right to petition as "inherent and absolute." *Krivanek v. Take Back Tampa Political Committee*, 625 So. 2d 840, 843 (Fla. 1993). Underlying the constitutional right to petition is the concept of government accountability, as noted in *Reynolds v. State*, 576 So. 2d 1300 (Fla. 1991).

117. The U.S. Supreme Court described the right just as eloquently:

> The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. The First Amendment of the Federal Constitution expressly guarantees that right against abridgment by Congress. … For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions – principles which the Fourteenth Amendment embodies in the general terms of its due process clause.

De Jonge v. State of Oregon, 299 U.S. 353, 364 (1937).

118. Florida is one of only sixteen states with a constitutional provision that authorizes the people to "instruct their representatives."[1] These rights were typically included in state constitutions because "the drafters of the earliest state constitutions labored under the recent memory of British attempts *to suppress town meetings and assert control over representative*

[1] *See* Cal. Const. art. I, § 3; Idaho Const. art. I, § 10; Ind. Const. art. I, § 31; Kan. Const. Bill of Rights, § 3; Me. Const. art. I, § 15; Mass. Const. Declaration of Rights, art. 19; Mich. Const. art. I, § 3; Nev. Const. art. I, § 10; N.H. Const. art. I, § 32; N.C. Const. art. I, § 12; Ohio Const. art. I, § 3; Or. Const. art. I, § 26; Tenn. Const. art. I, § 23; Vt. Const. Declaration of Rights, art. XX; W. Va. Const. art. III, § 16.

governments[,]" and "those actions figured prominently in colonists' decisions to safeguard the right to assemble, and to fuse it to guarantees of the right of instruction and the right to petition the legislature for assistance in redressing wrongs." *Lahmann v. Grand Aerie of Fraternal Order of Eagles,* 121 P. 3d 671, 681 (Or. 2005) (emphasis added).

119. The Elected Official Plaintiffs all take an oath of office to uphold the Florida Constitution in their roles as representatives of their constituents. The Onerous Preemption Penalties preclude the Elected Official Plaintiffs from fulfilling their oath of office.

120. The Onerous Preemption Penalties do irreparable damage to the rights of petition and instruction enshrined in the Florida Constitution. These rights have no value if the constituents invoking them are faced with the certainty that, as to particular topics solely of the Legislature's choosing, their concerns *must* be ignored by their elected officials at the risk of facing significant fines and removal from office.

121. The Onerous Preemption Penalties strike at the core of the American system of democratic representation: they suppress, in an insidious, Orwellian fashion, the voice of the local electorate through intimidation of local elected officials. The right to petition and instruct elected officials, which is guaranteed to Florida citizens by the Florida Constitution, is effectively suppressed by the Onerous Preemption Penalties, as the collective will of the local citizenry on the subject of firearm regulation, most clearly manifested through the legislative or quasi-legislative actions of their democratically elected local representatives, is silenced.

122. The Elected Official Plaintiffs are, through the threat of sanction, precluded from giving voice to the political interests of their constituents, whether by enactment of resolutions and ordinances or arguably even by public expressions of disapproval, on the subject of reasonable gun regulation within their community. Even if limited to symbolic, non-enforceable

gestures, the will of the Municipal Plaintiffs' residents is suppressed by the Onerous Preemption Penalties, which threaten to punish the Elected Official Plaintiffs and subject the Municipal Plaintiffs to potentially exorbitant liabilities, if they enact, attempt to enforce, or even "promulgate" any "ordinance, regulation, measure, directive, rule, enactment, order, or policy" relating to gun regulation.[2] *See* § 790.33(3)(f), Fla. Stat.

123. To be clear, Plaintiffs are not alleging that local residents are entitled to have laws enforced that are inconsistent with or preempted by state statute. However, it *is* the Plaintiffs' contention that local constituencies have a constitutional right to petition their democratically elected local officials and invoke their assistance in enacting local legislation, even if that legislation is ultimately determined to be unenforceable and merely symbolic. It is the role of the judiciary, not the Legislature, to determine whether particular local legislation is enforceable in light of controlling (and even preemptive) state law. Ironically, the Legislature was well aware of this legal remedy available to adversely affected individuals, but intended to threaten into submission (and eventually punish) local governments that do not "bend the knee."

124. The idea that the Governor may summarily remove from office any elected local representative merely for *voting* in accordance with the petitions and instructions of his or her constituents, but who is later found to have knowingly and willfully voted in a manner inconsistent with the will of the Legislature, erodes the foundation of American democracy.

[2] The inclusion of the term "promulgate," with its inherent ambiguities and potentially broad interpretation, enhances the chilling effect of the Onerous Preemption Penalties on the democratic process.

125. Accordingly, the Court should declare that the Onerous Preemption Penalties violate the constitutional rights to petition and instruct under Article I, Section 5 of the Florida Constitution.

126. All elements necessary to support a cause of action for declaratory relief are present:

a. There is a bona fide, actual, present need for a declaration that the Onerous Preemption Penalties are unconstitutional.

b. The declaration sought deals with a present controversy as to an ascertainable set of facts.

c. Constitutionally provided rights and privileges of the Plaintiffs are dependent upon the law applicable to the facts.

d. The Plaintiffs and the Defendants have an actual, present, adverse and antagonistic interest in the subject matter of this Complaint.

e. The antagonistic and adverse interests are all before this Court.

f. The relief sought is not merely the giving of legal advice or providing the answer to a question propounded from curiosity, but stems from an actual controversy.

Prayer for Relief

WHEREFORE, the Plaintiffs respectfully request that judgment be entered in their favor:

A. Declaring that the penalty provisions set forth in sections 790.33(3)(a), (c), (d) and (e), Florida Statutes, are unconstitutional; and

B. Granting such other relief as this Court deems just and proper.

Dated this 15th day of May, 2018.

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CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to: **Edward M. Wenger, Esq.**, Attorney for Defendants (except Defendant The State of Florida), Chief Deputy Solicitor General, Office of the Attorney General, The Capitol, PL-01, Tallahassee, FL 32399, telephone 850-414-3683, facsimile 850-410-2672, by email via the Florida's e-portal filing system [Edward.Wenger@myfloridalegal.com; Jenna.Hodges@myfloridalegal.com; Jennifer.Bruce@myfloridalegal.com], on this 15th day of May, 2018. I further certify that a true and correct copy of the foregoing will be served upon Defendant The State of Florida in the manner provided for service of summons.

/s/ Jamie A. Cole
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