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

CITY OF WESTON, FLORIDA, et al.,

Plaintiffs,

CASE NO.: 2018 CA 0699

v.

THE HONORABLE RON DESANTIS, et al.,

Defendants.
_____/

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

Plaintiffs,

CASE NO.: 2018 CA 1509

v.

STATE OF FLORIDA, et al.,

Defendants.
_____/

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

Plaintiffs,

CASE NO.: 2018 CA 0882

v.

THE STATE OF FLORIDA, et al.,

Defendants.
_____/

FINAL SUMMARY JUDGMENT FOR PLAINTIFFS AND AGAINST DEFENDANTS

A hearing was held on June 7, 2019 on Plaintiffs' and Defendants' motions for summary judgment. There are no genuine issues of material fact to be resolved and the cases are appropriate for summary judgment. The court has considered the motions and accompanying memoranda, all matters of record proper to consider on such motions, argument of counsel, and the law. Based upon those considerations, this order and final judgment is entered.

I. Introduction

In 1987 the Florida legislature passed Section 790.33, Florida Statutes, which prevents local governments from regulating the field of firearms and ammunition. In that statute the legislature declares it is occupying "the whole field of regulation of firearms and ammunition ... to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto." This legal doctrine is referred to as 'preemption' and the legislature can do this. No party in this case is challenging the validity of this preemption.

In 2011 the legislature amended Section 790.33, creating civil penalties for any person who violates that preemption by enacting or causing to be enforced a firearm or ammunition regulation. These penalties are both official and personal, meaning not only is the local governmental entity liable, the individual officials can be sued personally also. These officials, along with any other person who enacts or causes to be enforced a preempted firearm regulation, can also be removed from office by the governor. Those 2011 amendments, specifically with regard to Sections 790.33 (3) and 790.335 (4) (c), are referred to in this order as the penalty provisions.

In these three consolidated cases, Plaintiffs, which include 30 municipalities, three counties, more than 70 elected officials, and one individual citizen, challenge the penalty

provisions. They claim the civil penalties and removal provisions violate the Florida Constitution, the U.S. Constitution, or both. This order addresses each claim.

II. Legislative Immunity

The local governments claim local legislators are immune from suit because they are protected by legislative immunity, making the penalty provisions unenforceable against them. They argue legislative immunity for local legislators arises from three sources: (**A**) Florida common law, (**B**) separation of powers in the Florida Constitution, and (**C**) federal law. The State argues Florida's common law immunity in this area was abrogated. They also argue the legal principles underpinning the immunities do not apply to local governments.

A.

The court finds the legislature abrogated the common law legislative immunity. Section 790.33(3)(a) states in pertinent part "any person … that violates the Legislature's occupation of the whole field of regulation of firearms and ammunition …. by enacting or causing to be enforced any local ordinance … impinging upon such exclusive occupation of the field shall be liable as set forth herein." Local legislators are the only people who can enact local ordinances. While the statute does not actually contain the phrase 'legislative immunity is hereby abrogated for local legislators,' the State's only obligation in abrogating common law immunities is to make itself clear. *Bates v. St. Lucie County Sheriff's Office*, 31 So. 3d 210, 213 (Fla. 4th DCA 2010). The legislature was clear in its intent to create a new cause of action and for it to extend to local legislators.

B.

The court next finds legislative immunity arising from the separation of powers clause in the Florida Constitution does apply to judicial review of local legislators and cannot be waived by

statute. Florida courts regularly apply separation of powers principles to counties and cities. *See, e.g., Broward County v. La Rosa*, 505 So. 2d 422, 424 (Fla. 1987); *Solares v. City of Miami*, 166 So. 3d 887, 889 (Fla. 3d DCA 2015), *cert. denied*, 177 So. 3d 1271; *Trianon Park Condo. Ass'n, Inc. v. City of Hialeah*, 468 So. 2d 912, 918 (Fla. 1985); *City of Miami v. Wellman*, 976 So. 2d 22, 26 (Fla. 3d DCA 2008).

The language used by the United States Supreme Court in Bogan v. Scott – Harris, 18 S.Ct. 966 (1998), is pertinent to this case. Although dealing with a federal statute, the United States Supreme Court there concluded "the rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators." As the Court went on to say, the time and energy (and here, personal funds) 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 because of the threat of civil liability. And as the Court went on to say, the ultimate check on legislative abuse – the electoral process – applies with equal force at the local level, where legislators are often more closely responsible to the electorate. That language goes to the heart of this case.

Judicial power is vested in courts alone and judges cannot wield executive or legislative power. As a part of this separation, Florida courts cannot question any legislator about her or his legislative process because it would be impermissible judicial meddling in a purely political matter. *See League of Women Voters of Florida v. Florida House of Representatives*, 132 So. 3d 135, 146 (Fla. 2013).

The State's main argument on this issue asserts the legislature's ultimate authority over local governments. This is generally the case; the legislature could abolish all counties and cities if they so choose. Art. VIII, Sections 1(a) and 2(a), Fla. Const. But once those governments are

established, the Constitution mandates certain requirements for how they must be set up. The establishment of a legislative county commission is one. Art. VIII, Section 1(e), Fla. Const. Establishing municipal legislative bodies is another. Art. VIII, Section 2, Fla. Const. The legislature cannot change these fundamental aspects of counties and cities without amending the Constitution. In following this reasoning, the court sees no relevance to the legislative supremacy argument when considering the separation of powers question because the legislature cannot change the fundamental aspects of separation of powers.

Because local governments must have what amount to small legislatures, and because courts cannot interfere in legislative processes, neither this court, nor any other court in Florida, can enforce the civil penalty provisions of Section 790.33 against local legislators.

C.

The court also finds the U.S. Constitution affords local legislators legislative immunity. The First District Court of Appeal said so clearly:

> The Speech or Debate clause is limited by its terms to members of Congress, yet the court in *Tenney* applied the underlying common law principles to conclude that members of the California Legislature were immune from liability in a civil suit. Subsequently, the Court extended legislative immunity to local legislative officials and to non-legislators legitimately engaged in a legislative function.

Expedia, Inc., 85 So. 3d at 522 (citations omitted); *see also City of Pompano Beach v. Swerdlow Lightspeed Mgmt. Co., LLC*, 942 So. 2d 455, 456 (Fla. 4th DCA 2006).

For the stated reasons the penalty provisions violate the legislative immunity doctrine.

III. Governmental Function Immunity

The local governments claim the penalty provisions violate the immunity for discretionary governmental functions. The State reiterates its argument that local governments are not subject to a separation of powers analysis under Florida's Constitution, the origin of governmental

function immunity. Because separation of powers analysis is, in fact, implicated the court finds governmental function immunity applies and the local governmental entities and their officials are immune from suit.

Governmental function immunity exempts governments from appearing before a court and answering for judgment decisions inherent in the act of governing. "This is so because certain functions of coordinate branches of government may not be subjected to scrutiny by judge or jury as to the wisdom of their performance." *Commercial Carrier Corp. v. Indian River Cty.*, 371 So. 2d 1010, 1022 (Fla. 1979). Governmental function immunity is a limitation on the power of the courts and its application must be determined on a case by case basis. When determining if the governmental function immunity applies, courts distinguish between legislative "planning" decisions of a government, which the court may not review, and "operational" decisions for which a government may be held liable. *See, e.g. Wallace v. Dean*, 3 So. 3d 1035, 1045 (Fla. 2009); *Commercial Carrier*, 371 So. 2d at 1018–22; *City of Freeport v. Beach Cmty. Bank*, 108 So. 3d 684, 687 (Fla. 1st DCA 2013).

The State argues the legislature's decision to enact the penalty provisions eliminated local governments' discretion. Local governments are indeed subject to "legislative prerogatives in the conduct of their affairs." *Weaver v. Heidtman*, 245 So. 2d 295, 296 (Fla. 1st DCA 1971), and in 1987 the legislature exercised that prerogative to preempt local regulation of firearms. However, it does not follow that the local governments can be penalized by the courts for acting, or attempting to act, outside the scope of the legislature's preemption.

Here, were the penalty provisions to be enforced, they would necessarily subject local legislative planning decisions to judicial scrutiny because the penalty provisions create liability for enacting legislation—an inherently discretionary governmental function. Although the local

government may ultimately be mistaken, and the preempted law stricken by a court, this subsequent finding would not convert the original decision to enact legislation into the sort of operational act which would be subject to judicial review.

Accordingly, the court finds the penalty provisions violate the doctrine of governmental function immunity.

IV. Removal by the Governor

The penalty provisions include a provision that allows the governor to remove any person from her or his official office for enacting or enforcing a preempted law. Section 790.33(3)(e), Fla. Stat. The local governments raise a constitutional challenge to that provision. They argue the governor cannot remove any local official from office because the Florida Constitution already provides the method for removing them.

Article IV, Section 7 of the Florida Constitution states in pertinent part:

> (a) By executive order... the governor may suspend from office... any county officer, for malfeasance, misfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform official duties, or commission of a felony...
>
> (b) The senate may, in proceedings prescribed by law, remove from office or reinstate the suspended official...
>
> (c) By 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...

Section 790.33(3)(e) states: "A knowing and willful violation of [firearm preemption] ... shall be cause for termination of employment or contract or removal from office by the Governor." In that subsection the legislature grants the governor the power to remove local officers from office. The legislature did not have authority to do that.

Defendants' primary argument is that Article IV Section 7 is a floor, not a ceiling, on the governor's authority and that the subject statute merely supplements the constitutional authority –

that it "fills in the gaps." The court is mindful that the interpretive canon of negative implication should be applied with caution when interpreting constitutional provisions and that the legislature may enact legislation relating to the governor's exercise of his duties and powers already provided in the Florida Constitution. The removal provision, though, goes much further. Giving the governor removal power when the Constitution limits him as specifically provided is a grant of an entirely new power, not an expansion of a previously existing power. "Where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner." *Bush v. Holmes*, 919 So. 2d 392, 407 (Fla. 2006).

The court finds the governor removal provision is unconstitutional for the reasons stated above.

V. Speech

The local governments claim the penalty provisions violate free speech, association, petition, and instruction rights under the Florida and Federal Constitution. The local governments' position is:

- Local officials will not consider arguably non-preempted gun regulations because they are afraid of the onerous penalties, leading to suppression of political speech and action;
- The constitutional rights to free speech, free association, and the right to petition and instruct representatives protect the ability to engage in core political speech and action;
- Consequently, the penalties violate the Constitutions.

The State makes four points in response. First, the statute prohibits only the enactment or enforcement of firearms regulations, not speech or expression. *Florida Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, 461 (Fla. 1st DCA 2017). Second, enacting and enforcing is non-

expressive conduct, *Nev. Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126-27 (2011), and a legislator has no right to use official powers for expressive purposes. Third, private citizens not achieving their preferred policy outcomes does not violate expressive rights. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1101 (10th Cir. 2006). And fourth, restrictions directed at conduct that impose incidental burdens on speech do not violate the First Amendment. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

The legislature's preemption caused local governments to lose jurisdiction over the whole field of regulation of firearms and ammunition, and penalizing infringement of this preemption does not limit speech. All citizens are free to speak, assemble, or petition and instruct their local officials about firearms and ammunition.

VI. Vagueness

The local governments argue Section 790.33 is unconstitutionally vague and provides inadequate guidance as to what conduct is prohibited, or to whom the penalties apply. But whatever ambiguity may exist in the statute does not rise to the level of unconstitutional vagueness.

For a statute to be unconstitutionally vague it must fail to provide a person of common intelligence a reasonable opportunity to understand what conduct is prohibited, or it must invite arbitrary enforcement. *See Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015). Because the penalty provisions impose civil penalties, they are penal in nature and any doubt as to constitutionality must be resolved against the State. *State v. Wershow*, 343 So. 2d 605, 608 (Fla. 1977).

A "shapeless, hopeless[ly] indetermina[te] statute that produces grave uncertainty, regarding its scope will not survive a facial vagueness challenge even though some conduct . . . clearly falls within the provision's grasp," thus a statute is unconstitutionally vague on its face

only if "no standard of conduct is specified at all," and fails to give ordinary people fair notice of the punished conduct. *Martin v. State*, 259 So. 3d 733, 741 (Fla. 2018) (citations and internal quotation marks omitted).

Here, the local governments contend the law provides no standard to determine what regulation is preempted. The statute expressly incorporates the list of preempted areas of regulation found in Section 790.33(1). This is not a standardless prohibition. Contrary to the local governments' argument that the prohibitions in the preemption section and punished conduct are contradictory, ordinary statutory interpretation provides reasonably ascertainable guidelines. The court does not find Section 790.33 is unconstitutionally vague regarding what conduct is prohibited.

The local governments also contend Section 790.33 is unconstitutionally vague for failing to identify when and to whom the penalties apply. The court finds the law provides adequate standards to determine whose conduct is punishable. By its terms Section 790.33(3)(d) prohibits the use of public funds to defend, or reimburse the defense of, an action brought against an individual under the section only after the finding the preemption was violated knowingly and willfully.

The court does not find Section 790.33 is unconstitutionally vague.

VII. Due Process

The local governments claim the penalty provisions violate due process because they apply to local officials who vote against preempted ordinances. They argue that individual legislators cannot enact any law on their own, so, when a government enacts some law or ordinance, all of the legislators can be held responsible. The court disagrees with the local governments' reading of the penalty provisions and finds Section 790.33 does not violate due process of law.

Section 790.33 penalizes "any person .... that violates the Legislature's occupation of the whole field of regulation of firearms and ammunition ... by enacting ... any local ordinance or administrative rule or regulation impinging upon such exclusive occupation." The local governments are right that an individual official cannot make an ordinance into law. But each official plays her or his part in enacting the law by taking the "authoritative act" of voting in the affirmative. A local government cannot enact any law without actual people voting, and it is those people which the law targets. When an official does not vote or votes 'no' on an ordinance, they play no part in "making into law" that ordinance. Therefore, they enact nothing and are not liable under Section 790.33.

Because the law penalizes only those officials who violate it, it does not violate due process.

VIII. Contract Clause

Broward and Leon County Plaintiffs claim Section 790.33 unconstitutionally impairs its employment contracts with county administrators Bertha Henry and Vincent Long respectively. The local governments make two arguments: (**A**) first, Section 790.33 (3)(e) purports to give the governor "cause for termination of employment or contract or removal from office" regarding the administrators; (**B**) second, the purported impingement of Section 790.33(3)(b) & (d) on Broward County's obligation to defend and indemnify administrator Henry. The court finds Section 790.33 unconstitutionally impairs these employment contracts.

In order to find that a statute impairs a contract in violation of the Florida Constitution, the "[t]otal destruction of contractual expectations is not necessary," but rather, "[a]ny legislative action which diminishes the value of a contract is repugnant to and inhibited by the Constitution."

Sears, Roebuck & Co. v. Forbes/Cohen Fla. Props., L.P., 223 So. 3d 292, 299 (Fla. 4th DCA 2017).

A.

Under the existing contractual relationships between the county administrators and the counties' boards only the contractual parties can terminate the contractual relationship. By its plain terms, Section 790.33(3)(e) purports to alter these agreements by granting the governor a unilateral power to terminate the employment of the county administrators and by declaring certain action as "cause" for termination, even if the county administrators took those actions after being directed to do so by the board. Section 790.33(3)(e) Fla. Stat. The court agrees with the counties that, as applied to termination of employment, Section 790.33(3) substantially alters the contractual terms in a way that diminishes the value of the contract. Therefore, the court finds Section 790.33 is unconstitutional as applied to the employment clauses of the county administrators.

B.

Broward County argues the contract between the County and administrator Henry imposes a limited obligation to defend, hold harmless and indemnify the administrator, and Section 790.33 has the effect of voiding these obligations. The court does not agree that Sections 790.33(3)(b) & (d) violate the contract's indemnification section, because, by the terms of the contract, the parties clearly "acknowledge and agree that even though BOARD may proceed to handle a claim . . . against ADMINISTRATOR, certain claims, actions, demands, losses and/or liabilities may be precluded by law or may not be covered by the terms of this Article." Liability under Section 790.33(3) is an instance where the law explicitly precludes defense and indemnification, a scenario which was anticipated in the contract.

For the stated reasons the court finds Section 790.33(3)(e) violates the contract clause of the Florida Constitution.

IX. Declarations

The local governments requested a declaration of their rights under Florida's Constitution and the preemption statute. As these cases present a bona fide, actual, present practical need for the declarations sought, and the declarations deal with an ascertainable state of facts, this court is obliged to make such a ruling. *Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400, 404 (Fla. 1996). The local governments present four policy actions which they argue are not preempted or otherwise subject to the penalty provisions. Specifically, they request declaratory judgment on their rights and obligations to: (**A**) enact regulations under their constitutional "Local Option," (**B**) their rights to take actions as proprietors and employers, (**C**) their authority to enact enabling legislation under section 790.06 Fla. Stat., and (**D**) their authority to regulate firearms "components" and "accessories." The court will address each in turn.

A.

First, Florida's Constitution provides certain counties with "Local Option" powers to require a criminal background check and up to a 5 day waiting period for all firearms sales within the county, and local governments must be able to enact reasonable regulations attendant to those powers. Fla. Const. Art. VIII, Section 5 (b); s*ee Zingale v. Powell*, 885 So. 2d 277, 282 (Fla. 2004). This court declares that counties may lawfully enact enabling regulations to enforce the Local Option powers of Article VIII, Section 5(b) of the Florida Constitution, including by:

- Requiring documentation which demonstrates compliance with the waiting period by showing the date and hour of the firearm sale as well as the date and hour of the firearm transfer or receipt;

- Requiring documentation which demonstrates compliance with the criminal records history check. Such documentation is necessary to make such enforcement possible;
- Requiring posting of conspicuous signs throughout gun shows and providing written notice to all gun show dealers of the Local Option requirements of a waiting period and background screening;
- Actions reasonably tailored to enforce the Local Option powers, including enacting regulations such as requiring that guns brought into gun shows for sale be tagged and controlling access doors at gun shows to ensure regulatory compliance. The court further finds proposed actions which require creating records of firearms transactions, even if enacted in the form of regulations, do not violate section 790.335, Florida Statutes, which is limited solely to records of firearms and firearm owners.

B.

Second, the local governments may establish policies related to firearms in their capacities as employers and proprietors. The local governments' authority to act as proprietors is limited to internal government operations (e.g., workplace rules under Section 790.33(4)(c)) and private market participation (e.g., leasing, contracting, and operation of a traditionally private business).

C.

Third, the local governments are preempted from enacting further regulations under Section 790.06(12) Fla. Stat., which prohibits the open carrying of a firearm and provides exceptions to the rights of license holders to the concealed carry of a firearm in certain places and at certain times. The local governments are all already obliged to enforce these laws. As written neither the preemption provision nor Section 790.06 authorize further regulation of firearms by the local governments.

D.

Fourth, the local governments are preempted from the regulation of firearms "components" and "accessories." It was the legislature's intent to occupy the whole field of regulation of firearms and ammunition or components thereof. Section 790.33(4)(b) includes an exception permitting local law enforcement organizations to regulate "firearm accessories" for their own use, demonstrating the legislature's understanding that regulation of accessories was otherwise prohibited. Regulation of firearm "components" and "accessories" is the regulation of firearms: something the local governments may not do. *See Penelas v. Arms Technologies*, 778 So. 2d 1042, 1045 (Fla. 3d DCA 2001).

X. Conclusion

In accordance with the legal doctrine of preemption, the legislature may prohibit local regulation of firearms and accessories. However, the court finds the penalty provisions added in 2011 are unconstitutional. The penalty provisions are stricken for the reasons stated in this order. With all claims resolved, it is:

ORDERED AND ADJUDGED Plaintiffs' motion for summary judgment is granted and Final Judgment is entered for Plaintiffs. Defendants' motions for summary judgment are denied and Final Judgment is entered against Defendants.

DONE AND ORDERED this 26th day of July 2019.

CHARLES DODSON
CIRCUIT JUDGE

Copies to:
All parties of record