

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

CITY OF WESTON, FLORIDA, et al.,
Plaintiffs,

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

v.

**THE HONORABLE RICHARD
“RICK” SCOTT, et al.,**
Defendants.

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

**Leon County Case No.
2018 CA 001509**

v.

STATE OF FLORIDA, et al.,
Defendants.

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

**Leon County Case No.
2018 CA 00882**

v.

THE STATE OF FLORIDA,
Defendants.

**BRIEF OF CAMPAIGN TO DEFEND LOCATION SOLUTIONS,
LEAGUE OF WOMEN VOTERS OF FLORIDA, GIFFORDS LAW
CENTER TO PREVENT GUN VIOLENCE, BRADY, EQUALITY
FLORIDA INSTITUTE, INC., ALACHUA COUNTY LABOR
COALITION, CAMPAIGN TO KEEP GUNS OFF CAMPUS,
PROFESSOR RICK T. SU AS AMICUS CURIAE IN SUPPORT OF
PLAINTIFFS**

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| NRA-ILA, Firearm Preemption Laws, https://www.nraila.org/issues/preemption-laws/ (last vided Feb. 2, 2019) | 13 |
| Pub.L. 109-92, §§ 5(c)(1), 6(a), Oct. 26, 2005 | 10 |
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| Alexis de Tocqueville, <i>Democracy in America</i> 66-70 (8th ed. 1848)..... | 4 |
| Anthony Faiola and Robin Shulman, <i>Cities Take Lead On Environment As Debate Drags At Federal Level</i> , Washington Post, June 9, 2007, http://www.washingtonpost.com/wp- dyn/content/article/2007/06/08/ AR2007060802779.html | 8 |

| | |
|---|--------|
| American Nonsmokers’ Rights Foundation, <i>Local 100% Smokefree Laws in all Workplaces, Restaurants, and Bars: Effective by Year</i> , Apr. 4, 2016, http://www.no-smoke.org/pdf/current_smokefree_ordinances_by_year.pdf | 8 |
| Art. VIII, § 2(b), Fla. Const. | 7 |
| Cities, <i>State Preemption of Local Authority Continues to Rise</i> , https://www.nlc.org/article/state-preemption-of-local-authority-continues-to-rise-according-to-new-data-from-the (Apr. 4, 2018) | 11 |
| D.C. Mun. Regs. tit. 24, § 2323 | 10 |
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| Fran Spielman, <i>Chicago’s 7-Cents-A-Bag Tax Driving Down Bag Use, Study Shows</i> , CHICAGO SUN TIMES, Apr. 21, 2017 | 9 |
| Giffords Law Center, <i>Preemption of Local Laws</i> , https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws (last visited Feb. 6, 2019) | 13, 16 |
| Greg Allen, <i>In Florida, Cities Challenge State On Gun Regulation Laws</i> , NPR, https://www.npr.org/2018/04/02/598042099/in-florida-cities-challenge-state-on-gun-regulation-laws (Apr. 2, 2018) | 14 |
| John F. Dillon, <i>The Law of Municipal Corporations</i> § 9b (2d ed. 1873) | 7 |
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| Judith Cummings, <i>Beverly Hills Smoking Ban Clears Air But Ash Trays Stay</i> , N.Y. Times, Apr. 3 1987 | 8 |
| Justin Worland, <i>Why Cities Are the Next Frontier in the Right Against Climate Change</i> , Time, Sept. 29, 2015, http://time.com/4052920/cities-climate-change/ | 8 |

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|---|----|
| Leon Koenen, <i>San Luis Obispo: The First City with a Major Public Smoking Ban</i> , KCET, Mar. 8, 2011, https://www.kcet.org/social-focus/san-luis-obispo-the-first-city-with-a-major-public-smoking-ban | 8 |
| Mike Spies, <i>The N.R.A. Lobbyist Behind Florida’s Pro-Gun Policies</i> , <i>New Yorker</i> (Mar. 5, 2018) | 14 |
| N.Y. Comp. Codes R. & Regs. tit. 9, § 482.1–482.7 | 10 |
| Paul Diller, <i>Intrastate Preemption</i> , 87 B.U. L. Rev. 1113, 1122-23 n.44 (2007)..... | 6 |
| Taylor Scheibe, <i>Has Chicago’s Plastic Bag Ban Helped?</i> CHICAGO MAGAZINE, Aug. 1, 2016, https://www.chicagomag.com/Chicago-Magazine/August-2016/Plastic-Bag-Ban/ | 9 |
| Uniform Act, 1987 Fla. Sess. Law Serv. 87-23 (West)..... | 13 |
| Webster et al., <i>Effects of Maryland's Law Banning “Saturday Night Special” Handguns on Homicides</i> , <i>American Journal of Epidemiology</i> , Vol. 155, at 406 (2002) | 10 |

IDENTITY AND INTEREST OF AMICUS CURIAE

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

The Campaign to Defend Local Solutions is a nonpartisan effort focused on raising awareness of the spread of state preemption and punitive “super-preemption” laws, often pushed by special interest groups, occurring across the country. CDLS works with a network of over 1,100 individuals across 43 states, including 15 national and Florida-based organizations and over 50 elected officials to educate the public about these attacks on local democracy through state interference. CDLS was created to support local governments and local officials being sued under the very laws at issue in this case and provides support to local governments whose rights are under attack.

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

Giffords Law Center to Prevent Gun Violence provides legal and technical

assistance in support of gun violence prevention. Founded in the wake of an assault weapon massacre at a San Francisco law firm in 1993, Giffords Law Center focuses on promoting smart, effective gun laws. The organization has filed amicus briefs in many important gun safety cases, including *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Giffords Law Center also tracks and analyzes federal, state, and local firearms legislation, as well as legal challenges to firearms laws.

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

Equality Florida Institute, Inc., is the largest civil rights organization in the State of Florida dedicated to advancing full equality for Florida's lesbian, gay, bisexual, and transgender community. Through education, grassroots organizing, coalition building, and the courts when necessary, Equality Florida seeks to ensure

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

The Alachua County Labor Coalition (ACLC) is composed of individuals, unions, and worker-friendly organizations committed to the economic, environmental, civil, and social rights of working people, their families, and communities, and to the ecological systems that sustain us.

The Campaign to Keep Guns off Campus works with colleges and universities across the country to oppose legislative policies that would force loaded, concealed guns on campuses. Since 2008, The Campaign to Keep Guns off Campus has helped stop campus carry legislation in 18 states, and are the only national organization of its kind tasked to protect higher educational institutions and the communities they serve.

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I. INTRODUCTION

Active local political participation has long been vital to our nation’s democracy.¹ Local democratic action makes it possible for citizens to participate in policymaking within their communities—debating and passing laws that affect their friends, neighbors, and colleagues. The penalty provisions of Section 790.33 threaten local democracy through an unprecedented, unconstitutional, and unwise expansion of the concept of state preemption. The Court should hold that the penalty provisions of Section 790.33 are unconstitutional under the United States and Florida constitutions.

During the 20th century, most states—including Florida—amended their constitutions to provide cities with policymaking autonomy. But over the past three decades, states have increasingly turned to preemption statutes to limit local regulation in various policy areas, often at the behest of special interest groups. In some ways, Section 790.33 is like many of these statutes. Its stated intent is “to provide uniform firearm laws in the state,” Fla. Stat. § 790.33(2)(a), and it declares “null and void” any “existing ordinances, rules, or regulations” in the field of firearms and ammunition, *id.* § 790.33(1).

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

But Section 790.33 takes preemption one dangerous step further. Not only does Section 790.33 declare that the state occupies the entire field of firearms regulation, it subjects local legislators to personal liability and removal from office for their votes in that field. In a subsection titled “penalties,” Section 790.33 provides that “[a]ny person . . . that violates the Legislature’s occupation of the whole field of regulation of firearms and ammunition . . . by enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon such exclusive occupation of the field shall be liable.” *Id.* § 790.33(3)(a). Section 790.33 further provides that local officials who knowingly and willfully violate the statute shall be fined up to \$5,000, *id.* at 3(c); may not be indemnified for the costs of defending themselves, *id.* at 3(d); and may be removed from office by the governor, *id.* at 3(e).

Amici urge the Court to strike down the penalty provisions of Section 790.33. Prior to Florida’s enactment of the penalty provisions of Section 790.33, states had never imposed penalties on local officials for their legislative activity. While states may preempt localities’ legislative activity in many instances, the penalty provisions of Section 790.33 mark an unconstitutional extension of the state’s exercise of preemption authority.

II. FLORIDA’S PUNITIVE FIREARM PREEMPTION STATUTE IS PART OF A NATIONAL TREND TOWARD AGGRESSIVE PREEMPTION OF LOCAL POLICYMAKING

Section 790.33 provides that the state of Florida is “occupying the whole field of regulation of firearms and ammunition . . . to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto.” Fla. Stat. § 790.33(1). This type of law—commonly referred to as a “preemption statute”—has become an increasingly popular tool for state governments in recent decades. The expansion of Section 790.33 in 2011 to include harsh penalties represents the vanguard of a new trend of *punitive* preemption statutes, which not only limit local control of policy, but also threaten municipalities and elected officials with civil or even criminal liability for legislating in preempted fields.

1. The transition from Dillon’s Rule to Home Rule

In the nineteenth century, “Dillon’s Rule” limited the power of local governments. This rule, named for the nineteenth century jurist from whose orders it derived, stood for the proposition that a municipality could only exercise those powers explicitly granted to it by the state.² But during the twentieth

² Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113, 1122-23 n.44 (2007) (“[Municipalities] possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them....”)

century, waves of “Home Rule” reform increased the policymaking authority of local governments.³ The Home Rule regime effectively inverted Dillon’s Rule: under Home Rule, a locality presumptively had legislative authority unless the state expressly reserved exclusive power over—*i.e.*, had “preempted”—a particular policy area. By the 1980s, forty-eight states had granted at least some of their cities some form of Home Rule.⁴

Florida was one of those states. During the first half of the twentieth century, Florida courts consistently applied Dillon’s Rule to challenges to local regulation.⁵ *See, e.g., Williams v. Town of Dunnellon*, 169 So. 631 (Fla. 1936); *Heriot v. City of Pensacola*, 146 So. 654 (Fla. 1933). But in 1968, the people of Florida amended the state’s constitution to include “broad home rule powers.” *City of Boca Raton v. State*, 595 So.2d 25, 27 (Fla. 1992). The amendment guaranteed that cities had the authority to “exercise power for municipal purposes except as otherwise provided by law.” Art. VIII, § 2(b), Fla. Const. Florida courts have “repeatedly” construed the Florida Constitution “as giving municipalities

(alterations in original) (quoting John F. Dillon, *The Law of Municipal Corporations* § 9b, at 93 (2d ed. 1873)).

³ *See* Diller, *supra* note 2 at 1124-27.

⁴ *Id.* at 1127 n.65.

⁵ *See, e.g., Williams v. Town of Dunnellon*, 125 Fla. 114, 169 So. 631 (1936); *Heriot v. City of Pensacola*, 108 Fla. 480, 146 So. 654 (1933).

broad home rule powers.” *Boschen v. City of Clearwater*, 777 So. 2d 958, 963 (Fla. 2001).

2. The expansion of local policy innovation under Home Rule

With Home Rule regimes in place, cities across the country began to take a leading role in policy innovation. For example, cities passed many of the first smoking regulations.⁶ Those city ordinances spurred other cities—and, eventually, states—to pass their own similar regulations.⁷ More recently, cities have played a prominent role in addressing climate change.⁸ Whereas countries and states have struggled to agree on measures to reduce greenhouse gas emissions, local governments have been able to adopt various measures to reduce

⁶ See, e.g., Judith Cummings, *Beverly Hills Smoking Ban Clears Air But Ash Trays Stay*, N.Y. Times, Apr. 3 1987 (reporting how Aspen, Colorado and Beverly Hills, California were the first cities to prohibit smoking in most restaurants); Leon Koenen, *San Luis Obispo: The First City with a Major Public Smoking Ban*, KCET, Mar. 8, 2011, <https://www.kcet.org/social-focus/san-luis-obispo-the-first-city-with-a-major-public-smoking-ban>.

⁷ See American Nonsmokers’ Rights Foundation, *Local 100% Smokefree Laws in all Workplaces, Restaurants, and Bars: Effective by Year*, Apr. 4, 2016, http://www.no-smoke.org/pdf/current_smokefree_ordinances_by_year.pdf.

⁸ See, e.g., Justin Worland, *Why Cities Are the Next Frontier in the Fight Against Climate Change*, Time, Sept. 29, 2015, <http://time.com/4052920/cities-climate-change/> (“[M]any climate and energy experts have turned to cities precisely because mayors can often take action in ways that national governments cannot.”); Anthony Faiola and Robin Shulman, *Cities Take Lead On Environment As Debate Drags At Federal Level*, Washington Post, June 9, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/08/AR2007060802779.html> (explaining that, in the face of inaction by the federal government, “522 mayors representing 65 million Americans who have pledged to meet the Kyoto Protocol’s standard of cutting greenhouse gas emissions 7 percent below 1990 levels by 2012”).

such emissions. Many cities started small—for example by limiting emissions related to discrete capital projects—before moving incrementally toward more comprehensive policies.⁹

Under home rule regimes, it has been comparatively easy for local governments—which are generally smaller and nimbler than state governments—to introduce and then revise public policy experiments in the face of unintended consequences. In Chicago, for example, the city attempted to reduce the amount of plastic use and litter by banning thin, single-use plastic bags. Many retailers responded by providing its customers with plastic bags that were four times as thick.¹⁰ Although customers reused the thicker plastic bags at a slightly higher rate than before, total plastic usage actually increased under the ordinance.¹¹ Chicago responded by repealing the ban just over a year after it went into effect, replacing it with a 7-cent tax on disposable plastic and paper bags that has proved more effective at reducing total plastic usage.¹²

⁹ Rui Wang, *Adopting local climate policies: What have California cities done and why?* *Urban Affairs Review* 49 (4):593-613 (2013).

¹⁰ Taylor Scheibe, *Has Chicago's Plastic Bag Ban Helped?*, CHICAGO MAGAZINE, Aug. 1, 2016, <https://www.chicagomag.com/Chicago-Magazine/August-2016/Plastic-Bag-Ban/>.

¹¹ *Id.*

¹² Fran Spielman, *Chicago's 7-Cents-A-Bag Tax Driving Down Bag Use, Study Shows*, CHICAGO SUN TIMES, Apr. 21, 2017, <https://chicago.suntimes.com/news/chicagos-7-cents-a-bag-tax-driving-down-bag-use-study-shows/>

Cities have also used their policymaking flexibility to take the lead in addressing the gun violence epidemic. It was cities, not states, that first regulated the manufacture and sale of small, inexpensive, and poorly-made handguns—known as “Saturday-night specials,” or “junk guns”—which were disproportionately used in crime.¹³ Following the lead of the cities, eight states passed laws regulating junk guns.¹⁴ Similarly, in the 1990s cities passed the first laws requiring that guns be sold with trigger locks. State legislatures soon followed suit, passing similar legislation at the state level. *See, e.g.*, San Jose, Cal., Mun. Code Ch. 10.32.112–115 (1997), followed by Cal. Penal Code § 12088.1 (1999). Eventually, these city and state laws formed the basis for the federal law that prohibits licensed dealers from selling handguns without including a trigger lock or similar “safety devices.” *See* 18 U.S.C. § 922(z), amended by Pub.L. 109-92, §§ 5(c)(1), 6(a), Oct. 26, 2005.

¹³ Duke Helfand, *Two-Pronged Attack on Guns Launched*, L.A. Times, Apr. 3, 1996; *see also* Webster et al., *Effects of Maryland's Law Banning “Saturday Night Special” Handguns on Homicides*, American Journal of Epidemiology, Vol. 155, at 406 (2002).

¹⁴ Cal. Penal Code §§ 16380, 16900, 17140, 31900-32110; Cal. Code Regs. tit. 11, §§ 4047–4074; D.C. Code Ann. § 7-2505.04; D.C. Mun. Regs. tit. 24, § 2323; Haw. Rev. Stat. Ann. § 134-15(a); 720 Ill. Comp. Stat. 5/24-3(A)(h); Md. Code Ann., Pub. Safety, §§ 5-405, 5-406; Mass. Gen. Laws ch. 140, §§ 123, 131½, 131¾; 501 Mass. Code Regs §§ 7.01–7.16; 940 Mass. Code Regs. §§ 16.01-16.09; Minn. Stat. §§ 624.712, 624.716; N.Y. Penal Law § 400.00(12-a); N.Y. Comp. Codes R. & Regs. tit. 9, § 482.1–482.7.

3. The weaponization of preemption to attack local policy

As local legislative activity increased under Home Rule, powerful interests exerted countervailing pressure on state legislatures to constrain local policymaking authority. Public-sector unions, for example, turned to state preemption statutes in order to invalidate local ordinances that sought to increase competition in hiring. *See, e.g., Sioux City Police Officers' Assoc. v. City of Sioux City*, 495 N.W.2d 687, 695 (Iowa 1993) (addressing constitutional challenge, in which police union argued that state law preempted a local ordinance prohibiting nepotism in hiring). Before long, states had preempted local regulation of broad swaths of public policy, ranging from smoking to billboards to waste management.

State governments have been increasingly eager to prevent cities from experimenting in new areas of public policy. When, for example, the recent emergence of Uber and Lyft prompted cities to pass local ordinances addressing the problems created by ride sharing, most states in the country—a total of forty-one as of 2018—passed laws preempting municipal regulation of ride-sharing services.¹⁵ And when the city of Charlotte passed a law in 2017 to protect the

¹⁵ *See* Nat'l League of Cities, *State Preemption of Local Authority Continues to Rise*, <https://www.nlc.org/article/state-preemption-of-local-authority-continues-to-rise-according-to-new-data-from-the> (Apr. 4, 2018).

rights of transgender people to use bathrooms based on their gender identity, the state legislature in North Carolina passed a “bathroom bill” designed to nullify Charlotte’s ordinance. *See* N.C. Gen. Stat. §143-422.11 (repealed 2017).

Florida is part of this accelerated trend toward statewide preemption of local policymaking authority. In the last five years, the State has passed statutes prohibiting the local regulation of, among other things, alcoholic beverages, beekeeping, Styrofoam, wireless alarms, and desserts.¹⁶

4. **Firearms regulation and the emergence of punitive preemption**

As referenced above, many cities used their home rule authority to pass measures to address the problem of gun violence. It made sense for densely-populated cities with high rates of gun crime to pursue solutions that may not have been necessary for sparsely-populated rural areas or appropriate for application statewide. *See* Joseph Blocher, *Firearm Localism*, 123 Yale L.J. 82, 102–05 (2013).

The efforts of large cities to address these unique problems spurred the National Rifle Association to aggressively advocate for statewide preemption as

¹⁶ *See* Fla. Stat. § 561.342(3) (alcoholic beverages); *id.* § 586.10(1) (beekeeping); *id.* § 500.90 (Styrofoam); *id.* § 553.793 (wireless alarms); *id.* § 502.232 (frozen desserts).

a means to roll back the fruits of local policy experimentation.¹⁷ Starting in the late 1970s and early 1980s, a few states passed laws preempting specific aspects of firearm regulation.¹⁸ By the end of the 1980s, at least ten states had enacted broad preemption statutes.¹⁹ Florida was one of these states: it passed the initial version of Section 790.33 in 1987. The original Section 790.33 described the field that the state legislature exclusively occupied, but it did not include the penalty provisions at issue here. Instead, like all preemption statutes at the time, it left enforcement to parties who could challenge the validity of an allegedly preempted local ordinance in court.²⁰ Today, 45 states have adopted statutes that preempt at least some aspect of firearm or ammunition regulation.²¹

In 2011, the Florida legislature—with the drafting assistance of NRA lobbyist Marion Hammer²²—amended Section 790.33 to include the

¹⁷ See NRA-ILA, *Firearm Preemption Laws*, <https://www.nraila.org/issues/preemption-laws/> (last visited Feb. 2, 2019).

¹⁸ See, e.g., Minn. Stat. § 609.67 (1977) (preempting regulation of machine guns); Md. Code Ann., *Envir.* § 3-105(a)(3) (1982) (preempting regulation of noise control for shooting sports clubs).

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

²⁰ See *Firearms and ammunition—Uniform Act*, 1987 Fla. Sess. Law Serv. 87-23 (West).

²¹ Giffords Law Center, *Preemption of Local Laws*, <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws> (last visited Feb. 6, 2019).

²² Greg Allen, *In Florida, Cities Challenge State On Gun Regulation Laws*,

unprecedented penalty provisions at issue here, a dangerous change in the course of preemption law. The amended Section 790.33 appeared to be the first preemption statute—anywhere in the United States and on any subject—that penalizes local officials in their individual capacities for their votes on legislation. Section 790.33 declares that any person who knowingly and willfully violates the Legislature’s occupation of the field shall be fined up to \$5,000, may not be indemnified for the costs of defending oneself, and may be removed from office by the governor. § 790.33(3). For the first time, a local legislator could be *personally punished* for voting to enact—or “causing to be enforced”—a local ordinance that seeks to address local gun violence.

While Section 790.33’s penalty provisions were the first such expansion of state preemption law, a number of other states soon followed suit by amending their own firearm preemption laws to penalize local legislators for their votes. In 2014, Mississippi augmented its firearm preemption statute by subjecting local

NPR, <https://www.npr.org/2018/04/02/598042099/in-florida-cities-challenge-state-on-gun-regulation-laws> (Apr. 2, 2018); *see also* Mike Spies, The N.R.A. Lobbyist Behind Florida’s Pro-Gun Policies, *New Yorker* (Mar. 5, 2018) (discussing Hammer’s influence in the Florida legislature). Ms. Hammer also helped the Florida legislature draft another punitive statute—which subjected Florida doctors to, among other punishments, a fine of up to \$10,000 and permanent license revocation for asking patients whether they own firearms or have firearms in their homes. *See Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1303 (11th Cir. 2017) (en banc). The Eleventh Circuit ruled *en banc* that the statute’s prohibition on doctors inquiring about their patients’ possession of firearms violated the First Amendment. *Id.* at 1318–19.

officials to a \$1,000 fine for voting for an ordinance that conflicts with the state statute, plus “all reasonable attorney’s fees and costs incurred by the party bringing the suit.” Miss. Code. Ann. § 45-9-53(5)(c) (West 2018). The Mississippi preemption statute, like Section 790.33, also prohibits the use of public funds to defend or reimburse local officials for legal expenses incurred in defending themselves.

In 2016, Arizona enacted a law making local officials personally liable for a fine of up to \$50,000 for “knowing and willful” violations of the state law. Ariz. Rev. Stat. Ann. § 13-3108 (2017). Local officials are also subject to termination. The statute further provides that if a court determines a political subdivision has knowingly violated the preemption law, the court may assess a civil penalty of up to \$50,000. The state also has the authority to withhold revenue from a local entity that refuses to repeal an ordinance the state finds to be in conflict with the preemption law, even if there is no evidence the local ordinance is actually being enforced. *Id.* § 41-194.01 (2016).

In Kentucky, the state recently amended its firearm preemption statute to *criminalize* violations of the state’s preemption of firearms regulation. The amended statute declares that “[a] violation of [the state’s preemption of firearms regulation] by a public servant shall” constitute “official misconduct,” a misdemeanor. Ky. Rev. Stat. Ann. § 65.870 (6) (West 2012). The statute further

provides that local legislators are liable for the attorney’s fees and costs of those who successfully challenge local action that violates the preemption statute “or the spirit thereof.” *Id.* § 65.870 (4)(a).

Florida, Mississippi, Arizona, and Kentucky may not be the last states to modify their preemption laws to threaten individual local legislators. In the last three years, at least five other states introduced legislation that would personally punish local officials for enacting preempted ordinances.²³

The 2011 penalty provisions added to Section 790.33 are thus in the vanguard of an alarming trend. As discussed below, this approach to enforcing state preemption law is an unprecedented threat to local democracy.

III. SECTION 790.33 THREATENS LOCAL DEMOCRACY

In the same year that the people of Florida amended their constitution to guarantee home rule authority to local governments, the U.S. Supreme Court recognized that “institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens.” *Avery v. Midland County, Tex.*, 390 U.S. 474, 481 (1968). The legislators who

²³ See Giffords Law Center, *Preemption of Local Laws*, <https://lawcenter.giffords.org/gun-laws/policy-areas/other-laws-policies/preemption-of-local-laws> (last visited Feb. 6, 2019).

serve in these institutions of local government should be free to debate and vote on regulations in response to the unique demographic, geographic, and economic problems present in their cities and counties. But in amending Section 790.33 in 2011, the Florida legislature improperly sought to stifle local democratic participation and experimentation by combining statewide policy preemption with penalties for local officials. This radical escalation of state preemption will chill local democratic participation and action in several ways.

First, punitive preemption statutes like Section 790.33 will discourage citizens from participating in local government. As the U.S. Supreme Court warned, a threat of personal liability for local legislative activity “may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability.” *Bogan*, 523 U.S. 44, 44-45. Public service already requires significant sacrifice. That sacrifice becomes greater if local representatives face the prospects of job loss, civil fines, and personal litigation costs for their votes on public legislation. Many qualified candidates, particularly those without significant personal resources, may decide that the financial risk is too great. Local democracy will suffer if otherwise qualified and engaged citizens are deterred from participating.

In addition to deterring service in local governments, the penalty provisions of Section 790.33 will chill the legislative conduct of those who do

serve. If a legislator is thinking about the threat of personal financial losses instead of the public interest of the city she represents, the quality of democratic representation will suffer. As the Supreme Court has recognized in the context of legislative immunity, legislators should be “uninhibited” in the “discharge of their legislative duty, not for their private indulgence but for the public good.”

Tenney v. Brandhove, 341 U.S. 367, 377 (1951).²⁴

The Supreme Court’s concerns are particularly relevant in the context of state preemption statutes, which often use general terms to describe the legislative field that local governments may not regulate. When proposing, debating, and voting on an ordinance, local legislators cannot know with confidence whether a court might later decide that the ordinance is preempted by state law.²⁵ Those legislators may therefore refuse to vote (or even speak in support of) valid local regulations for fear of incurring personal liability.

²⁴ See also *Spallone v. United States*, 493 U.S. 265, 279–80 (1990) (“The imposition of sanctions on individual legislators is designed to cause them to vote, not with a view to the interest of their constituents or of the city, but with a view solely to their own personal interests.”).

²⁵ State courts often struggle to define the contours of a state-preempted field. For example, the Colorado Supreme Court split four to three in deciding that the legislature’s express preemption of the field of “rent control” invalidated a town’s affordable housing requirement for developers. *Town of Telluride v. Lot Thirty-Four Venture L.L.C.*, 3 P.3d 30, 32 (Colo. 2000). Similarly, the Texas Supreme Court divided four to three in deciding that the state’s express preemption of the field of alcohol regulation invalidated a Dallas zoning ordinance that prohibited the sale of alcohol in residential areas. *Dallas Merchs. & Concessionaire’s Ass’n v. City of Dallas*, 852 S.W.2d 489, 490 (Tex. 1993).

Suppose, for example, that a local legislator wished to discuss, draft, or vote on an ordinance regulating the sale of large-capacity detachable ammunition magazines. Is an *accessory* like a detachable magazine a “firearm” or a “component” of a firearm under Section 790.33? Is it covered by Section 790.33 at all? Such uncertainty forces local legislators to choose between inaction and the prospect of financial penalties and removal from office.

The penalty provisions of Section 790.33 may even discourage officials from engaging in one of the most traditional functions of local government: commercial zoning. Although Section 790.33 permits local governments to enact “[z]oning ordinances that encompass firearms businesses along with other businesses,” it prohibits “zoning ordinances that are designed *for the purpose* of restricting or prohibiting the sale, purchase, transfer, or manufacture of firearms or ammunition.” § 790.33(4)(a) (emphasis added). Thus, a legislator who in good faith believes that a zoning ordinance complies with Section 790.33 may decide against voting for it for fear that it will subsequently be determined that the ordinance was enacted with an improper purpose. Indeed, the “purpose” language of Section 790.33, when viewed in light of the law’s penalty provisions, may discourage a legislator from voting on any zoning ordinance that could conceivably burden a business that sells firearms or ammunition.

These concerns are not hypothetical. In Kentucky, for example, a firearms dealer sued the city of Dayton for enacting a zoning ordinance that restricted the locations where gun shops could operate. *Peter Garrett Gunsmith, Inc. v. City of Dayton*, 98 S.W.3d 517 (Ky. Ct. App. 2002). The suit was filed in 2000, after Kentucky enacted its firearm preemption law but before the state amended the statute to criminalize violations by local policymakers. The Court of Appeals ultimately concluded that Dayton’s zoning ordinance was not in conflict with the state’s preemption law. *Id.* at 519-21. But what would have happened had the city’s councilmembers faced the prospect of paying fines, funding their own defenses in court, and removal from office? Due to fear of personal liability, the council members may never have voted for the zoning ordinance in the first place, thereby halting a perfectly valid regulation.

These chilling effects are undesirable and unnecessary. States may pass laws preempting local regulation—and may permit individuals to sue to enforce such laws—without subjecting local legislators to individual liability for their legislative activity. The penalty provisions of Section 790.33 will needlessly impair the quality of local government.

IV. CONCLUSION

For the foregoing reasons, *Amici* urge the Court to strike down as unconstitutional the penalty provisions of Section 790.33.

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Respectfully submitted,

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**Pro hac vice motion pending*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the undersigned electronically filed the foregoing with the Clerk of the Courts on March 4, 2019, by using the E-Filing Portal, which will send a notice of electronic filings to all counsel of record.

/s/ Philip R. Stein

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this computer-generated brief is prepared in Times New Roman 14-point font and complies with the typeface requirements of Florida Rule of Appellate Procedure 9.210(a).

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