IN THE FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 1D15-5520
LOWER CASE NO. 2014-CA1168

FLORIDA CARRY, INC. and THE SECOND AMENDMENT FOUNDATION, INC.,

Appellants/Cross-appellees,

v.

CITY OF TALLAHASSEE, FLORIDA, JOHN MARKS, NANCY MILLER, ANDREW GILLUM, and GIL ZIFFER,

Appellees/Cross-Appellants.

AMICUS CURIAE BRIEF OF THE CITY OF WESTON, FLORIDA, AND THE CITY OF MIRAMAR, FLORIDA, IN SUPPORT OF APPELLEES/CROSS-APPELLANTS

ON APPEAL FROM A FINAL JUDGMENT ENTERED IN THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

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INTRODUCTION

> In America, … [t]he independence of the township was the nucleus round which the local interests, passions, rights, and duties collected and clung. It gave scope to the activity of a real political life most thoroughly democratic and republican. The colonies still recognized the supremacy of the mother-country; monarchy was still the law of the State; but the republic was already established in every township.
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> * * *
>
> [L]ocal assemblies of citizens constitute the strength of free nations. Town-meetings are to liberty what primary schools are to science; they bring it within the people's reach, they teach men how to use and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty.

Alexis de Tocqueville, *Democracy in America*, Ch. II: Origin Of The Anglo-Americans – Part II; Ch. V: Necessity Of Examining The Condition Of The States – Part I.

The penalty provisions of section 790.33(3), Florida Statutes (specifically, subsections (c) through (e); hereafter, the "Penalty Provisions") 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. Rights guaranteed to Florida citizens by both the United States and Florida Constitutions to petition and instruct their elected officials are effectively suppressed by the Penalty Provisions, as the collective will of the local citizenry on the subject of gun regulation, most clearly manifested through the

legislative or quasi-legislative actions of their democratically elected local representatives, is silenced.[1]

STATEMENT OF THE INTEREST OF AMICI

The City of Weston, Florida, is a predominantly residential community of slightly more than 60,000 residents. The City of Miramar, Florida, is a somewhat larger, predominantly residential community of approximately 135,000 residents. Both Cities are located in Broward County, Florida. Their elected officials are cognizant that they are placed in office and derive their authority from their constituents, whose collective voice they represent.[2]

The Cities' elected officials have labored to effectuate reasonable gun regulations governing municipally-owned facilities, including working with state legislators to attempt to modify the preempting restrictions broadly imposed by section 790.33, Florida Statutes, all to no avail. These same local officials are 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.

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[1] The City of Weston and the City of Miramar (collectively, the "Cities") concur with the individual appellees' invocation of legislative immunity, as derived in Florida under the separation of powers doctrine, and their comprehensive analysis of same. As such, that issue will not be addressed herein.

[2] Weston's elected officials consist of a mayor and four commissioners. Miramar's elected officials consist of a mayor, vice-mayor and three commissioners.

Even if limited to symbolic, non-enforceable gestures, the will of the Cities' residents is suppressed by the Penalty Provisions, which threaten to punish individual elected officials if they enact, attempt to enforce, or even "promulgate" any "ordinance, regulation, measure, directive, rule, enactment, order, or policy" relating to gun regulation.[3] §§ 790.33(3)(a), (f), Fla. Stat.

SUMMARY OF ARGUMENT

The Penalty Provisions render wholly illusory the constitutional rights of citizens to petition and instruct their local elected officials as to matters of public concern.[4] Through these provisions, the state legislature has installed a virtually insurmountable barrier to democracy between the citizenry and their local representatives. While it is one thing to petition or instruct a local elected official on matters of local grievance with the understanding that such petition or instruction *may or may not* be disregarded by the official, it is entirely another to

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[3] Merriam-Webster's Online Dictionary's first definition of the verb "promulgate" is "to make (an idea, belief, etc.) known to many people." *See* http://www.merriam-webster.com/dictionary/promulgate, last accessed May 9, 2016. The trial court found below and the City of Tallahassee contends here that in the context of the Penalty Provisions, "promulgate" means no more than the enactment and enforcement of local legislation or regulations. *See* Tallahassee Initial Br. At 11-20. While the Cities do not take issue with Tallahassee's analysis, the inclusion of the term "promulgate," with its potentially broad interpretation (as argued by the appellants), certainly enhances the chilling effect of the Penalty Provisions on the democratic process.

[4] The appellees briefly touched upon this subject in their motion for summary judgment. R. 212-13.

do so with the *knowledge* that one's elected representative is *precluded* by state law from heeding the petition or instruction upon pain of fine and removal from office. The Cities are unaware of any law in this country imposing such draconian consequences on elected officials for the mere legislative act of voting in accordance with constituents' wishes.

The danger posed by the Penalty Provisions is not limited to the regulation of guns, but rather reaches any subject the state legislature, in its sole discretion, may hereafter determine to be forbidden fruit, out of reach of meaningful local legislative consideration. To be clear, it is *not* the Cities' contention that local residents are entitled to have laws enforced that are inconsistent with or preempted by state statute. However, it *is* the Cities' contention that local constituencies have a constitutional right to invoke the assistance of their democratically elected local officials in enacting local legislation, even if that legislation is purely symbolic and unenforceable. It is the role of the judiciary, not the state legislature, to determine whether particular local legislation is enforceable in light of controlling (and even preemptive) state law.

In the trial court, the appellants and the Attorney General touted the need for the Penalty Provisions by invoking the Second Amendment and noting local government resistance to state or federal preemption on this subject. The history of this country, though, demonstrates that the crucible of ideas is properly tested through judicial enforcement of laws, not through the undermining of democracy. Never before has the solution to local non-compliance with state law been found in preventing the citizenry from finding a voice in their local elected representatives

by punishing those officials if they heed their constituents. Florida should not become the first state in the history of this country to venture down such a dark path of political oppression.

ARGUMENT

I. BOTH THE U.S. AND FLORIDA CONSTITUTIONS SECURE TO THE CITIZENRY THE NON-ILLUSORY RIGHT TO PETITION AND INSTRUCT DULY ELECTED REPRESENTATIVES ON MATTERS OF PUBLIC CONCERN.

A. The nature of the rights to petition and instruct.

The First Amendment to the U.S. Constitution provides, in relevant part, that "Congress shall make no law … abridging … the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const., Amd. I. Florida's Constitution provides even greater rights, securing to Florida's citizens the *additional* right "to instruct their representatives." Fla. Const., Art. I, Sec. 5.

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):

> [O]ur opinion today stands foursquare on the principle of accountability, which is the bedrock of American democracy. Our system of government is premised on the belief that every public officer and employee should be accountable and should not lie entirely beyond the reach of public questioning. Both the federal and

> Florida Constitutions provide a right to petition officials for redress of grievances partly to ensure that such accountability exists.

Id. at 1302. 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).

This Court, too, has noted the importance of the right to petition, recognizing in *Cross Key Waterways v. Askew*, 351 So. 2d 1062 (Fla. 1st DCA 1977), that whenever regulatory authority is shifted from the local level to the state, doing so "touches sensibilities as old as the Revolution itself, because it affects the right of access to government, the right of the people effectively to instruct their representatives, and to petition for redress of grievances on which other cherished rights ultimately depend." *Id.* at 1065. The Penalty Provisions, of course, do much more than merely shift regulatory authority; they go on to punish local officials, individually, who give voice to the will of constituents who elected them to office.

The right to instruct elected representatives first appeared in Florida's 1885 Constitution. It was carried over into the 1968 Constitutional Revision and is described in the commentary thereto as a "separate right." *See* 25A Fla. Stat. Ann. 149 (2010) (cmt. To Art. I, § 5, Fla. Const.). Florida is one of only 16 states with a

constitutional provision that authorizes the people to "instruct their representatives."[5] 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 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).

While there is little Florida case law addressing this particular right of instruction, the Florida Supreme Court has noted in the redistricting context that "while the Florida Constitution grants the Legislature the authority to apportion the legislative districts every ten years, the authority is circumscribed by the right of the people to instruct their representatives on the manner in which apportionment should be conducted." *In re Senate Joint Resolution of Legislative Apportionment 1176*, 83 So. 3d 597, 603 (Fla. 2012). *See also In re Apportionment Law Senate*

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[5] *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.

Joint Resolution No. 1305, 1972 Regular Session, 263 So. 2d 797, 807 (Fla. 1972) (acknowledging the "right to instruct" and holding "any person has a right to instruct any and all representatives, whether his own or not. This right is not limited by the apportionment plan as each person maintains this right to instruct, whether he has one or several representatives."). Justice Spector, dissenting in the 1972 decision, noted that the Florida Constitution goes further than the corresponding provision of the federal constitution because the latter "does not extend to the guarantee of the right of the people to instruct their representatives as does our state constitution." *Id*. at 813 (Spector, J., dissenting). He explained that the "right to instruct one's representative is but a restatement of the right to *effective representation*. *The two concepts are one in the same*." *Id.* at 816 (emphasis added).

Courts outside Florida have interpreted "right to instruct" provisions as protecting citizens' input into the legislative process. For example, in *Unruh v. City Council,* 143 Cal. Rptr. 870 (Cal. Dist. Ct. App. 1978), a city council fired an employee of the city police department after he wrote a letter to a state senator criticizing the police chief and the operation of the police department. *Id.* He also distributed the letter to the media and the district attorney's office. *Id.* Although the Court upheld the firing, its basis was the distribution of the letter to individuals other than the state senator. *Id.* The court was careful to note that "[i]n the case at bar, appellant's letter to Senator Zenovich was entitled to protection under article I, section 3 of the California Constitution…." *Id.* at 873 n.4.

In *Simpson v. Cenarrusa*, 944 P. 2d 1372 (Idaho 1997), Idaho's Supreme Court considered the constitutionality of Proposition 4, which was approved by Idaho voters. Proposition 4 was passed in 1996 to support the imposition of term limits. *Id.* at 1373. Relevantly, it contained several instructions to Idaho legislators to "use all their delegated powers to pass" a term-limit amendment to the U.S. Constitution and "to apply to congress for a convention for proposing amendments to the United States Constitution." *Id.* While the Idaho Supreme Court ruled that certain aspects of Proposition 4 were unconstitutional, it upheld the instructions contained therein, noting that "the Idaho Constitution, Article I, § 10, gives the people the right to instruct their representatives and to petition the legislature for the redress of grievances. This section enables voters to instruct the Idaho members of congress and legislators." *Id.* at 1376-77. Again, the "right to instruct" clause was a basis for protecting voters' communications with their representatives about their desired outcome regarding an important government rule.

B. The Penalty Provisions eviscerate the constitutional rights to petition and instruct and undermine effective local governance.

The Penalty Provisions do considerable, if not irreparable, violence to the rights of petition and instruction enshrined in the Florida and U.S. Constitutions. One must question what value the rights have if the constituents invoking them are faced with the certainty that, as to particular topics solely of the state legislature's choosing, their concerns *must* be ignored by their elected officials at the risk of facing significant fines and removal from office.

While it may be frustrating or even infuriating to state legislators that local communities might continually petition or instruct local officials to enact resolutions and ordinances that conflict with and are preempted by state statute – even if only for symbolic value – the remedy for that situation lies in judicial intervention and invalidation of the local legislation. In fact, section 790.33(3)(b) specifically contemplates that a local government may be permanently enjoined from *enforcing* any local legislation or regulation preempted by section 790.33(1). § 790.33(3)(b), Fla. Stat. ("If any county, city, town, or other local government violates this section, the court shall declare the improper ordinance, regulation, or rule invalid and issue a permanent injunction against the local government prohibiting it from enforcing such ordinance, regulation, or rule."). The Penalty Provisions, however, represent the proverbial thumbscrews to be applied to inflict maximum pain.

The Attorney General argued below that the Penalty Provisions became necessary because local jurisdictions supposedly continued to disregard state authority on the issue of gun regulation. Ironically, the City of Tallahassee and its elected officials were sued not for enactment or enforcement of a preempted local law, but rather for the arguably symbolic gesture of not repealing an ordinance that was conceded by everyone involved as (i) being without legal effect, and (ii) not being enforced. The action, therefore, sought to punish the individual elected officials involved for not bending their knee, so to speak, to the state legislature. Therein lies one of the many dangers inherent in the Penalty Provisions.

In contrast, the democratic process provides inherent safeguards against endless local opposition to controlling state statutes. Eventually, citizens at the local level will weigh the consequences of having their municipalities subjected to legal proceedings to invalidate and enjoin local pronouncements – including the resulting expenditure of tax dollars in litigation expenses, the potential imposition of sanctions, and resulting negative publicity – and decide whether to retain or remove from office local officials who continue to espouse futile legal positions. That is what the democratic process contemplates. The state's remedy, however, is ***not*** to interfere with or thwart democracy, itself, by pitting local elected officials against their constituents and silencing the voices of *select* elements of the electorate.

Time and again during this country's history, particular constituencies – whether at the local, state or even federal levels – have been opposed to other invocations of at-the-time disfavored constitutional rights, whether imposed by statute or court order. Whether those rights involved equal protection of racial minorities in the 1950's and 1960's – for example, official state opposition to the integration of schools mandated by *Brown v. Bd. of Education*, 347 U.S. 483 (1954) – or even Congressional legislative opposition to the First Amendment flag-burning ruling of *Texas v. Johnson*, 491 U.S. 397 (1989), or, more recently, county clerk opposition to the same-sex marriage ruling of *Obergefell v. Hodges*, ___ U.S. ___, 135 S. Ct. 2584 (2015), in each instance, the solution for addressing constituent opposition to controlling law has been found in invoking the authority of the judicial branch and obtaining enforcement of the law, not in punishing the

individual legislators who, rightly or wrongly, voted or espoused positions precisely as their constituents expected them to.

What the Penalty Provisions do here, in effect, is isolate a particular segment of the citizenry – those who would prefer to petition for local legislation to address gun regulation – and prevents their access to the normal political process by punishing their elected representatives who agree with the targeted group. In the future, this type of oppressive legislation might extend to other controversial or sensitive subject matters. As previously noted, the Cities do not contend that any citizen enjoys the right to *succeed* in having particular local legislation passed or having that legislation deemed enforceable. State preemption of local laws is an unremarkable concept and is not disputed here. However, every citizen *does* have the right to engage controversial issues with equal access to the political process.

Under less onerous circumstances – that is, where the limitations imposed were merely substantive in nature, rather than punitive – attempts to restrict access to the political process by limiting what relief may be obtained through the legislative process have been deemed unconstitutional. For example, in *Evans v. Romer*, 854 P. 2d 1270 (Colo. 1993), the Colorado Supreme Court considered an amendment to the Colorado Constitution that, in addition to invalidating all existing local legislation providing protections on the basis of sexual orientation, also purported to prevent gays and lesbians from obtaining future protections from

discrimination by petitioning for legislative relief.[6] *Id.* at 1272. The court struck down the provision in question concluding that it restricted the targeted group's constitutionally guaranteed right of access to the political process.[7] The court stated:

> The right of citizens to participate in the process of government is a core democratic value which has been recognized from the very inception of our Republic up to the present time. *See* John Hart Ely, *Democracy and Distrust* 87 (1980) (the Constitution "is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with ... process writ large – with ensuring broad participation in the processes and distributions of government"); Note, *Developments in the Law: Elections*, 88 Harv.L.Rev. 1111, 1114 (1975) ("no institution is more central to the United States' system of representative democracy than the election"). [footnote omitted]
>
> The value placed on the ability of individuals to participate in the political process has manifested itself in numerous equal protection cases decided by the Supreme Court over the last thirty years. These include … cases involving *attempts to limit the ability of certain groups to have desired legislation implemented through the normal political processes*, *see, e.g., Washington v. Seattle Sch. Dist. No. 1*,

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[6] Analogously here, section 790.33 invalidated all local legislation relating to gun regulation and preempted all future attempts to provide local legislative relief on the subject. § 790.33(1), Fla. Stat. Conspicuously, though, even in *Evans*, no attempt was made to punish legislators who nonetheless voted to enact or promulgated local legislation that granted protections based on sexual orientation.

[7] After the initial *Evans* decision issued, the case was remanded to the trial court for further proceedings, but eventually returned for review before the Colorado Supreme Court, which again struck down the constitutional provision. *See Evans v. Romer*, 882 P. 2d 1335 (Colo. 1995) ("*Evans II*"). *Evans II* was eventually reviewed by the U.S. Supreme Court and affirmed on alternate grounds. *Romer v. Evans*, 517 U.S. 620, 626 (1996).

> 458 U.S. 457, 102 S.Ct. 3187, 73 L.Ed.2d 896 (1982); *Gordon v. Lance*, 403 U.S. 1, 91 S.Ct. 1889, 29 L.Ed.2d 273 (1971); and *Hunter v. Erickson*, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed.2d 616 (1969).

Evans, 854 P. 2d at 1276 (emphasis added).[8]

Focusing on U.S. Supreme Court precedents, the Colorado Supreme Court continued its analysis, finding that strict scrutiny was required whenever political participatory rights were being infringed, "since the ordinary assumption which informs judicial review of legislation that 'even improvident decisions will eventually be rectified by the democratic process[ ] and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted,' [citation omitted] is rendered *inapplicable* when participatory rights are at issue." 854 P. 2d at 1277 (emphasis added; citing *Vance v. Bradley,* 440 U.S. 93, 97 (1979)). The Colorado Supreme Court also took pains to highlight that invalidation of restrictions on the right of political access was not dependent on the suspect classification of the targeted group:

> [T]he danger presented by such restrictive legislation is that it may deny "any effective voice in the governmental affairs which substantially affect their lives." [citation omitted]. Thus, to the extent that legislation impairs a group's ability to effectively participate (which is not to be confused with successful participation) in the process by which government operates, close judicial scrutiny is necessitated.

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[8] *See also* Laurence H. Tribe, *American Constitutional Law* 1062 (2d ed. 1988) ("At their core, all voting-related rights are rights to participate in [the] process [of representative government], and the import of the process for our system of government freights them with their indisputable moment.").

854 P. 2d at 1277 (quoting *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969)). The court's explanation continued: "Thus, Justice White, speaking for the Court [in *Hunter v. Erickson*, 393 U.S. 385 (1969)], noted that Akron was free to require a plebiscite as to 'all its municipal legislation,' but having chosen to do otherwise, he concluded that Akron could *no more disadvantage any particular group by making it more difficult to enact legislation in its behalf* than it may dilute any person's vote or give any group a smaller representation than another of comparable size." 854 P. 2d at 1279 (citing *Hunter*, at 393; emphasis added). "The principle … does not apply simply to racial minorities." *Id.* at 1283 (citing *Hunter*, 393 U.S. at 393, 89 S.Ct. at 561). "[D]efendants' argument that the right to participate equally in the political process applies only to traditionally suspect classes is without merit." *Id.* at 1284. *See also Ruiz v. Hull*, 957 P. 2d 984 (Ariz. 1998) (citing *Evans, supra*, and striking down law requiring local governments to "act" only in English on grounds that "it impinges upon both the fundamental right to participate equally in the political process and the right to petition the government for redress").

CONCLUSION

The Penalty Provisions are a heavy-handed attempt by the Florida Legislature to silence dissent from local communities looking to engage in or simply promote reasonable gun regulation, but the implications of the Legislature's oppressive efforts extend well beyond this particular field. While the Legislature may certainly preempt and wholly occupy an area of the law, thus rendering

conflicting local legislation unenforceable, it cannot interfere with the sacrosanct, democratic legislative process by punishing local elected officials who act in accordance with the will of their constituents on disfavored topics and effectively deprive those constituencies of meaningful participation in the political process. The Court should respectfully affirm the trial court's ruling below and further hold the Penalty Provisions unconstitutional for the reasons articulated herein.

Respectfully submitted,

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