FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

FLORIDA CARRY, INC.; and THE SECOND AMENDMENT FOUNDATION, INC., Appellants, v. CITY OF TALLAHASSEE, FLORIDA; JOHN MARKS; NANCY MILLER; ANDREW GILLUM; and GIL ZIFFER, Appellees.	CASE NO. 1D15-5520 L.T. CASE NO. 2014-CA-1168

BRIEF OF THE LAW CENTER TO PREVENT GUN VIOLENCE, THE LEAGUE OF WOMEN VOTERS OF FLORIDA, STATES UNITED TO PREVENT GUN VIOLENCE, CONCERNED LOCAL ELECTED OFFICIALS, AND CONCERNED STATE ELECTED OFFICIALS AS AMICUS CURIAE IN SUPPORT OF CROSS-APPELLANTS

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Florida State Senator Dwight Bullard;
Michigan State Representative Jon Hoadley;
Michigan State Representative Robert Wittenberg

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INTERESTS OF *AMICI CURIAE*

Amici curiae include non-profit organizations, mayors, local officials, and state legislators with an interest in preventing gun violence and promoting local democratic action.

The 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, the Law Center focuses on promoting smart, effective gun laws. The Law Center 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). The Law Center also tracks and analyzes federal, state, and local firearms legislation, as well as legal challenges to firearms laws.

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 13,000 members grouped into 29 local chapters.

States United to Prevent Gun Violence is a grassroots network of 30 state affiliates working to reduce gun death and injury through stronger laws, community education, and grassroots action.

Mayor Peggy Bell of the Town of Cutler Bay, Florida; Mayor Oliver Gilbert of Miami Gardens, Florida; Mayor Geraldine Muoio of West Palm Beach, Florida; Mayor Gary Resnick of Wilton Manors, Florida; and Commissioner Sue Weller of High Springs, Florida are each concerned local Florida elected officials with an interest in promoting democratic participation.

Florida State Senator Dwight Bullard; Michigan State Representative Jon Hoadley; and Michigan State Representative Robert Wittenberg are each concerned state elected officials interested in protecting and promoting local democratic participation.

SUMMARY OF ARGUMENT

The penalty provisions of Section 790.33 represent an unprecedented, unconstitutional, and unwise expansion of the concept of state preemption. Accordingly, the Court should hold that the penalty provisions of Section 790.33 are unconstitutional under the United States and Florida constitutions.

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).

In critical ways, however, Section 790.33 represents a radical departure from traditional preemption law. 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 a

local official who knowingly and willfully violates the statute shall be fined up to $5,000, *id.* at 3(c); may not be indemnified for the costs of defending himself, *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. 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 traditional exercise of preemption authority. The policymaking autonomy of local governments has ebbed and flowed, but, 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.

These extreme penalty provisions plainly violate the absolute legislative immunity guaranteed by the United States and Florida Constitutions, under which local officials are immune from suit for their legislative acts. By subjecting local officials to personal liability for enacting local ordinances and regulations, Section 790.33 punishes conduct that is quintessentially legislative.

The chilling effects of Section 790.33 underscore the importance of the constitutional guarantee of absolute legislative immunity. The prospect of personal liability will deter qualified individuals from seeking local office, and individuals who do serve may be deterred from voting for valid local regulations for fear of incurring personal liability.

ARGUMENT

I. THE PENALTY PROVISIONS OF SECTION 790.33 ARE AN UNPRECEDENTED EXTENSION OF THE STATE'S PREEMPTION POWER

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 "state preemption" statute—has become an increasingly popular tool for state governments. Between 1980 and 2010, state preemption statutes gradually eroded local control over various fields of regulation, thereby tilting the balance of power away from localities and towards states. The penalty provisions of Section 790.33, however, represent a radical escalation of this trend, combining state preemption with personal liability for local legislators.

In the nineteenth century, local policymaking was limited by "Dillon's Rule," which stood for the proposition that a municipality could only exercise those powers explicitly granted to it by the state.[1] But during the twentieth

[1] Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113, 1122-23 n.44 (2007) (citing and quoting John F. Dillon, *The Law of Municipal Corporations* § 9b, at 93 (2d ed. 1873)) ("[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.[2] The Home Rule regime effectively inverted Dillon's Rule. Under Dillon's Rule, a locality could only legislate if the state had affirmatively granted it regulatory power in a particular area; under Home Rule, a locality presumptively had legislative authority unless the state had expressly reserved exclusive power over—or had "preempted"—a particular policy area. By the 1980s, 48 states had some form of Home Rule for at least some cities.[3]

With Home Rule regimes in place, cities began to take a leading role in policy innovation during the second half of the twentieth century. For example, cities passed many of the first indoor-smoking regulations.[4] Those city ordinances spurred other cities—and, eventually, states—to pass their own regulations.[5] More recently, cities have played a prominent role in addressing climate change.[6]

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[2] *See id*. at 1124-27.

[3] *Id*. at 1127 n.65.

[4] *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 Beverley Hills, California were the first cities to prohibit smoking in most restaurants).

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

[6] *See, e.g*., Justin Worland, *Why Cities Are the Next Frontier in the Right Against Climate Change*, Time, Sept. 29, 2015, available at 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

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 such emissions. Many cities started small—for example by limiting emissions related to discrete capital projects—before moving incrementally toward more comprehensive policies.[7]

Cities also have taken the lead in preventing gun violence. For example, 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 are disproportionately used in crime.[8] Following the lead of the cities, eight states passed laws regulating junk guns.[9] Similarly, in the 1990s

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cannot."); Anthony Faiola and Robin Shulman, *Cities Take Lead On Environment As Debate Drags At Federal Level*, Washington Post, June 9, 2007, available at 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.").

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

[8] 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).

[9] 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

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.[10] Eventually, these city and state laws formed the basis for federal laws regulating firearms.[11]

As local legislative activity increased under Home Rule, countervailing pressure at the state level to limit local authority and to provide uniform state-wide policies increased as well. Public-sector unions, for example, turned to state preemption statutes in order to invalidate local ordinances that sought to increase competition in hiring.[12] Before long, states had preempted local regulation of a variety of policy areas, including cigarette advertising restrictions, minimum wage laws, rent control, anti-discrimination ordinances, billboard restrictions, fireworks regulation, alcohol sale restrictions, and environmental measures. In Florida alone, the State has passed statutes preempting the local regulation of, among other

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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.

[10] *See, e.g.*, San Jose, CA, Municipal Code, Chapter 10.32.112–115 (1997), followed by Cal. Penal Code § 12088.1 (1999).

[11] *See* 18 U.S.C. § 922(z), amended by Pub.L. 109-92, §§ 5(c)(1), 6(a), Oct. 26, 2005.

[12] *See, e.g., Sioux City Police Officers' Assoc. v. City of Sioux City*, 495 N.W.2d 687, 695 (Iowa 1993) (police union arguing that state law preempted a local ordinance prohibiting nepotism in hiring).

things, alcoholic beverages, animals, buildings, businesses, consumer protection, natural resources, fire prevention, and food. [13]

The National Rifle Association has been particularly aggressive in advocating for preemption as a means to advance its policy goals.[14] Starting in the late 1970s and early 1980s, a few states passed laws preempting specific aspects of firearm regulation.[15] By the end of the 1980s, at least ten states had enacted broad preemption statutes.[16] 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

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[13] *See, e.g.*, F.S. § 561.342(3) (alcoholic beverages); *id.* §§ 413.08 (service animals), 586.10(1) (beekeeping), 767.10 (dangerous dogs); *id.* § 553.73 (buildings); *id.* §§ 468.386 (auctioneers), 539.001(20) (pawnbrokers), 487.051 (pest control); *id.* § 501.160 (price gouging during emergencies); *id.* §§ 125.275 (air quality), 373.4131(stormwater management); *id.* § 633.0215. (fire prevention); *id.* §§ 500.12(5), 502.232, 500.60 (food safety).

[14] *See* NRA-ILA, Firearm Preemption Laws, https://www.nraila.org/issues/preemption-laws/ (last visited Apr. 1, 2016).

[15] *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).

[16] 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).

parties who could challenge the validity of an allegedly preempted local ordinance in court.[17] By 2010, at least forty-three states had similar statutes that preempted local regulation of firearms.[18]

In 2011, Florida amended Section 790.33 to include the unprecedented penalty provisions at issue here, a dangerous change in the course of preemption law. As amended, Section 790.33 declares that any person who violates the Legislature's occupation of the field shall be fined up to $5,000, may not be indemnified for the costs of defending himself, and may be removed from office by the governor. § 790.33(3). For the first time, a local legislator can be *personally punished* for enacting—or "causing to be enforced"—a local ordinance that impinges upon the field of firearms regulation.

The penalty provisions contained in the amended Section 790.33 appear to have been the first state preemption statute enacted to penalize local officials—in their individual capacities—for their votes on legislation. *Amici* have attempted to locate earlier examples of preemption statutes imposing individual liability on local officials for carrying out their official legislative acts but have found none.

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

[18] Law Center to Prevent Gun Violence, *Local Authority to Regulate Firearms Policy Summary*, Dec. 1, 2013, http://smartgunlaws.org/local-authority-to-regulate-firearms-policy-summary/

While Section 790.33's penalty provisions were the first such expansion of state preemption law, several other states soon amended their own firearms preemption laws to impose penalties on local legislators for their votes. In 2014, Mississippi amended its firearms preemption statute to subject local 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."[19] 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.

Meanwhile, Kentucky recently amended its firearms preemption statute *to criminalize* violations of the state's preemption of firearms. 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.[20] The statute further provides that local legislators are liable for the attorney's fees and costs of those who successfully challenge the validity of a local regulation.[21]

Florida, Kentucky, and Mississippi may not be the last states to enforce their preemption laws through punitive threats against individual local legislators. At

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[19] Miss. Code. Ann. § 45-9-53(5)(c) (West).

[20] Ky. Rev. Stat. Ann. § 65.870 (6) (2012) (West).

[21] *Id*. § 65.870 (4)(a).

the time of this writing, the Iowa General Assembly is considering a state firearms preemption statute that largely mirrors the language of Florida's Section 790.33. The proposed bill would subject local legislators to fines of up to $5,000 and removal from office, and would prohibit the use of public funds to defend those public servants accused of violating the statute.[22]

Section 790.33 is thus in the vanguard of an alarming trend. As discussed below, this unprecedented approach to enforcing state preemption law is unconstitutional and threatens the health of local democracy.

II. SECTION 790.33 PLAINLY VIOLATES THE ABSOLUTE LEGISLATIVE IMMUNITY GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS

It is "well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities." *Bogan v. Scott-Harris*, 523 U.S. 44, 46 (1998).[23] 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

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[22] See *HF 59 – Iowa Legislature – BillBook*, https://www.legis.iowa.gov/legislation/BillBook?ga=86&ba=hf59 (last visited Apr. 29, 2016).

[23] *See also Bryant v. Jones*, 575 F.3d 1281, 1303-07 (11th Cir. 2009) (absolute immunity attaches to proposal in budget to eliminate position), *cert. denied*, 130 S. Ct. 1536 (2010).

by those who severed the Colonies from the Crown and founded our Nation." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). Under the U.S. Constitution, legislative immunity is protected by the Speech or Debate Clause of Article I, Section 6. *Bogan*, 523 U.S. at 46.

Florida courts have likewise recognized that the Florida Constitution protects the bedrock principle of legislative immunity:

> It is clear . . . that the privileges and immunities protecting all public officials, including members of the legislature, arise from the common law. The significance of this point is simply this: if legislative privileges and immunities existed under the common law, they continue to exist, apart from specific constitutional provisions like the Speech or Debate Clause, to the extent that a state continues to recognize the common law.

Florida House of Representatives v. Expedia, Inc., 85 So. 3d 517, 523 (Fla. Dist. Ct. App. 2012). Moreover, legislative immunity is integral to the separation of powers enshrined in the Florida Constitution. "The power vested in the legislature under the Florida Constitution," the Court of Appeal explained, "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." *Id.* at 524. The Florida Constitution's prescribed "separation" among the three branches of government would fall apart "if the judicial branch could compel an inquiry into . . . aspects of the legislative process." *Id.*

There are hard cases about what constitutes "legislative activity" for purposes of determining whether absolute legislative immunity applies, *Bogan*, 523 U.S. at 46, but this is not one of them. Section 790.33 is targeted directly at local officials' legislative activity. Indeed, Section 790.33 punishes legislators for "enacting or causing to be enforced any local ordinance or administrative rule or regulation" that impinges upon the State's occupation of the field of firearms. A legislator, of course, only "enact[s] . . . [a] local ordinance" through voting, and the Supreme Court has held that the act of voting is "quintessentially legislative." *Bogan*, 523 U.S. at 55.

In short, the penalty provisions of Section 790.33 punish "quintessentially legislative" activity and therefore violate the absolute legislative immunity guaranteed by the United States and Florida Constitutions.

III. PENALTY PROVISIONS LIKE THOSE IN SECTION 790.33—IF ALLOWED TO SURVIVE—WILL HAVE A CHILLING EFFECT ON DEMOCRACY.

The penalty provisions of Section 790.33 subject local legislators to personal liability and removal from office for their votes on local ordinances and regulations. These provisions threaten to chill local democratic participation and democratic law-making by deterring qualified individuals from seeking local office and by distorting the thinking of the individuals who do serve, thus discouraging valid local legislative action in areas that are not reserved to the state.

A. The penalty provisions of Section 790.33 will discourage qualified individuals from running for local office.

Local political participation is vital to a healthy democracy. As early as the nineteenth century, political observers recognized the benefits of engaged and active local governments.[24] Local democracy makes it possible for citizens to participate in policymaking within their communities—debating and passing laws that affect their friends, neighbors, and colleagues. Maintaining local democratic participation has become especially important as the population of the United States has grown, diluting state and federal representation. For example, at the time of the First United States Congress in 1789, there was one Representative for approximately every 30,000 people.[25] As of the census of 2010, there is one Representative for every 710,000 people.[26]

Local democracy also provides opportunities for a broad swath of citizens to run for democratic office. There are generally fewer financial and logistical barriers to entry at the local level, which makes it possible for citizens to

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

[25] *See* U.S. Census Bureau, A*pportionment of the House of Representatives: 1789-2000*, https://www.census.gov/population/apportionment/data/2000_apportionment_results.html.

[26] U.S. Census Bureau, *2010 Apportionment Results*, https://www.census.gov/population/apportionment/data/2010_apportionment_results.html.

participate in democratic leadership regardless of their individual financial resources.[27] A candidate for city council or county supervisor, for example, may not need the personal resources or interest-group support that is often required for electoral success at the state and federal level.

Statutes like Section 790.33 will discourage citizens from participating in local government. "[T]he 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." *Bogan*, 523 U.S. at 44-45. Public service already requires significant sacrifice. That sacrifice becomes greater if local representatives have to pay fines—and pay to defend themselves from lawsuits—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 as a result if otherwise qualified and engaged citizens are deterred from participating.

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[27] *See* Roderick M. Hills, Jr., *City Making: Building Communities Without Building Walls by Gerald E. Frug. Princeton, NJ: Princeton University Press. 1999*, 113 Harv. L. Rev. 2009, 2028 (2000) (explaining how the traits of local government "reduce the cost of participating in the political process").

B. The penalty provisions of Section 790.33 will unnecessarily chill valid and beneficial legislative activity.

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, in considering legislative action, a legislator is thinking about the threat of personal financial losses instead of the interests of the city or county he represents, the quality of democratic representation will suffer. As the Supreme Court recognized over sixty years ago, "[l]egislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).[28]

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 is off limits to local governments. When proposing, debating, and voting on legislation, local legislators cannot know with confidence whether a court might later decide that the legislation is preempted by state law. Indeed, state courts often struggle to define the contours of a state-preempted field. For example, the Colorado Supreme Court decided—by a vote of four to three—that the state

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[28] *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.").

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).

With the penalty provisions of Section 790.33 hovering over their votes, local legislators may refuse to support legislation that is not, in fact, within the area reserved for the state. For example, Section 790.33 may discourage local office holders from engaging in one of the most traditional functions of local government: enacting zoning laws. 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 combined with 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 licensed firearms dealer sued the City of Dayton for enacting a zoning ordinance that restricted the locations in which a gun shop could operate.[29] The suit was filed in 2000, after Kentucky enacted its firearms preemption law but before the state amended the statute to criminalize violations by local policymakers.[30] After a careful review of the text and purpose of the preemption statute, the Court of Appeals of Kentucky concluded the state legislature did not intend to eliminate a city's power to control the location of gun shops within the city's zoning scheme. Accordingly, Dayton's zoning ordinance was upheld.[31]

But what would have happened had the members of Dayton's city council faced the prospect of paying fines, funding their own defense in court, and being

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[29] *Peter Garrett Gunsmith, Inc. v. City of Dayton*, 98 S.W.3d 517 (Ky. Ct. App. 2002).

[30] *See* note 20, *supra*, and accompanying text.

[31] *City of Dayton*, 98 S.W.3d at 519-21. In the wake of this case, the Kentucky legislature enacted a statute prohibiting local governments from "utilze[ing] the zoning process to prohibit a federally licensed firearms manufacturer, importer, or dealer from locating at any place within the jurisdiction at which any other business may locate." The statute also prohibited governments from enacting any regulations that "could be reasonably construed to solely affect federally licensed firearms manufacturers, importers, or dealers." Ky. Rev. Stat. Ann § 100.325.

removed from office for their votes? Due to fear of personal liability, the council members may never have voted for the law in the first place, thereby halting a perfectly valid regulation designed to serve the interests of the public.

These chilling effects are undesirable and unnecessary. States may pass laws preempting areas of policy—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. "Regardless of the level of government, the exercise of legislative discretion should not be . . . distorted by the fear of personal liability." *Bogan*, 523 U.S. at 52.

CONCLUSION

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

CERTIFICATE OF TYPE SIZE AND STYLE

This Brief is typed using Times New Roman 14 point, a font which is not proportionately spaced.

Respectfully submitted,

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