

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

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

Plaintiffs,

vs.

CASE NO. 2014-CA-1168

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

Defendants.

DEFENDANTS' ANSWER
AND COUNTERCLAIM FOR DECLARATORY RELIEF

Come now Defendants, the City of Tallahassee, John Marks, Nancy Miller, Andrew Gillum and Gil Ziffer and submit this answer to Plaintiffs' complaint and also submit a counterclaim for declaratory relief.

ANSWER

1. Admitted.
2. Admitted.
3. Defendants are without sufficient information to admit or deny the allegations contained in this paragraph and such allegations are therefore denied.
4. Defendants are without sufficient information to admit or deny the allegations contained in this paragraph and such allegations are therefore denied.
5. Admitted.
6. Admitted.
7. Admitted.

8. Admitted.

9. Admitted.

JURISDICTION AND VENUE

10. Admitted.

11. Admitted.

FACTUAL ALLEGATIONS

12. Defendants are without sufficient information to admit or deny the allegations contained in this paragraph and such allegations are therefore denied.

13. Defendants are without sufficient information to admit or deny the allegations contained in this paragraph and such allegations are therefore denied.

14. Defendants are without sufficient information to admit or deny the allegations contained in this paragraph and such allegations are therefore denied.

15. Defendants are without sufficient information to admit or deny the allegations contained in this paragraph and such allegations are therefore denied.

16. Defendants are without sufficient information to admit or deny the allegations contained in this paragraph and such allegations are therefore denied.

17. Defendants are without sufficient information to admit or deny the allegations contained in this paragraph and such allegations are therefore denied.

18. Admitted.

19. Admitted.

20. Admitted.

21. Defendants admit the allegations concerning Mayor Marks' role in the City government. Defendants deny that Mayor Marks is an appropriate defendant for Plaintiffs' claims.

22. Admitted.

23. Defendants admit the allegations concerning the commissioners' roles in the City government. Defendants deny that the individual commissioners are appropriate defendants for Plaintiffs' claims.

24. Section 10 of the City Charter speaks for itself.

25. Section 16 of the City Charter speaks for itself.

26. Section 2-32 of the Tallahassee Code speaks for itself.

27. Section 12-61 of the Tallahassee Code speaks for itself. The remaining allegations contained in this paragraph are denied.

28. Section 13-34 of the Tallahassee Code speaks for itself.

29. Admitted.

30. Denied.

31. Section 790.33 of the Florida Statutes speaks for itself.

32. Denied.

33. Denied.

34. Denied.

35. Denied.

36. Section 790.33 of the Florida Statutes speaks for itself.

37. Section 790.33 of the Florida Statutes speaks for itself.

38. Section 790.33 of the Florida Statutes speaks for itself.

COUNT I: DECLARATORY RELIEF

39. The responses to paragraphs 1-38 are restated and incorporated by reference as if set out in full.

40. Admitted.

41. Defendants are without sufficient information to admit or deny the allegations contained in this paragraph and such allegations are therefore denied.

42. Defendants are without sufficient information to admit or deny the allegations contained in this paragraph and such allegations are therefore denied.

43. Denied.

44. Admitted.

45. Denied.

46. Admitted.

47. Section 790.33 of the Florida Statutes speaks for itself.

48. Denied.

49. Section 790.33 of the Florida Statutes speaks for itself.

50. Denied.

51. Defendants deny that Plaintiffs are entitled to the relief requested.

52. Defendants deny that Plaintiffs are entitled to the relief requested.

53. Defendants deny that Plaintiffs are entitled to the relief requested.

54. Defendants deny that Plaintiffs are entitled to the relief requested.

55. Defendants are without sufficient information to admit or deny the allegations contained in this paragraph and such allegations are therefore denied.

Defendants deny that Plaintiffs are entitled to any of the relief requested.

COUNT II: INJUNCTIVE RELIEF

56. The responses to paragraphs 1-38 are restated and incorporated by reference as if set out in full.

57. Defendants deny that Plaintiffs are entitled to the relief requested.

58. Denied.

59. Denied.

60. Denied.

61. Denied.

62. Denied.

63. Denied.

64. Denied.

65. Defendants are without sufficient information to admit or deny the allegations contained in this paragraph and such allegations are therefore denied.

Defendants deny that Plaintiffs are entitled to any of the relief requested.

COUNT III: DECLARATORY AND INJUNCTIVE RELIEF

66. The responses to paragraphs 1-38 are restated and incorporated by reference as if set out in full.

67. Defendants deny that Plaintiffs are entitled to the relief requested.

68. Denied.

69. Denied.

70. Defendants admit that the City Commission met on February 26, 2014 and considered agenda item 15.01. The remaining allegations contained in this paragraph are denied.

71. Defendants admit that the Commission discussed agenda item 15.01 on February 26, 2014 and voted to table the item. The remaining allegations contained in this paragraph are denied.

72. Denied.

73. Denied.

74. Denied.

75. Admitted.

76. Defendants deny that Plaintiffs are entitled to the relief requested.

77. Defendants deny that Plaintiffs are entitled to the relief requested.

78. Defendants deny that Plaintiffs are entitled to the relief requested.

79. Defendants are without sufficient information to admit or deny the allegations contained in this paragraph and such allegations are therefore denied.

Defendants deny that Plaintiffs are entitled to any of the relief requested.

COUNT IV: INJUNCTIVE AND MANDAMUS RELIEF

80. The responses to paragraphs 1-38 are restated and incorporated by reference as if set out in full.

81. Denied.

82. Article I, Section 8 of the Florida Constitution speaks for itself.

83. Denied.

84. Denied.

85. Denied.

86. Denied.

87. Section 27 of the City Charter speaks for itself.

Defendants deny that Plaintiffs are entitled to any of the relief requested.

AFFIRMATIVE DEFENSES

First Affirmative Defense

Plaintiffs' Complaint fails to state a claim upon which relief can be granted and is due to be dismissed pursuant to Rule 1.140(b) of the Florida Rules of Civil Procedure.

Second Affirmative Defense

Plaintiffs' claims are due to be dismissed due to Plaintiffs' lack of standing.

Third Affirmative Defense

The actions taken by Defendants which are the subject of Plaintiffs' complaint were authorized in whole or in part under the City's home rule powers as provided under Article VIII, Section 2 of the Florida Constitution, and the Municipal Home Rule Powers Act, Chapter 166 of the Florida Statutes.

Fourth Affirmative Defense

The relief sought by Plaintiffs, and the penalty provisions of Section 790.33 of the Florida Statutes, are unconstitutional under the United States Constitution and the Florida Constitution for the reasons set out in the following counter-claim for declaratory relief.

COUNTERCLAIM

The City of Tallahassee, John Marks, Nancy Miller, Andrew Gillum, and Gil Ziffer (“Counter-Plaintiffs”) hereby file this Counterclaim against Florida Carry, Inc. and the Second Amendment Foundation (“Counter-Defendants”), and state as follows:

1. This is an action seeking a declaratory judgment declaring that certain provisions of Section 790.33 of the Florida Statutes violate the United States Constitution and the Constitution of the State of Florida.

2. Certain provisions of the statute in question, which the Counter-Defendants seek to enforce in their complaint, purport to hold city officials personally liable for the votes they take – or, in the immediate action, decline to take. Penalizing elected officials for the act of voting, with sanctions running from monetary penalties to outright removal from office, is an affront to long-standing principles of law under the United States and Florida Constitutions. Indeed, the Florida statute creating such penalties appears to be essentially unprecedented in the history of the United States.

PARTIES

3. Counter-Plaintiff the City of Tallahassee is a municipal corporation organized and existing under the laws of the State of Florida.

4. Counter-Plaintiff John Marks is the Mayor of the City of Tallahassee.

5. Counter-Plaintiffs Nancy Miller, Andrew Gillum, and Gil Ziffer are City Commissioners for the City of Tallahassee.

6. Counter-Defendant Florida Carry, Inc. purports to be a not-for-profit corporation, chartered under the laws of the State of Florida, with a principal place of business located at 1090 Wild Holly Drive, Port Orange, Florida 32129.

7. Counter-Defendant the Second Amendment Foundation purports to be a not-for-profit corporation organized under the laws of the State of Washington, with its principal place of business located at 12500 NE 10th Place, Bellevue, Washington 98005. The Second Amendment Foundation is purportedly registered with the Florida Division of Consumer Services as a recognized charity in Florida under Registration Number CH5582.

JURISDICTION AND VENUE

8. This Court has jurisdiction pursuant to Sections 26.012 and 86.011 of the Florida Statutes.

9. Venue is proper in this action pursuant to Section 47.011 of the Florida Statutes.

FACTS

10. On May 2, 2014, Counter-Defendants filed a Complaint For Declaratory Judgment and Injunctive Relief (the “Complaint”) against Counter-Plaintiffs, claiming that Sections 12-61(a) and 13.34(b)(5) of the Tallahassee Code regarding the discharge of firearms violate Section 790.33 of the Florida Statutes.

11. Section 790.33 purports to provide for the preemption of local ordinances relating to firearms by the state legislature, including rules or regulations governing the purchase, sale, and possession of firearms and ammunition. In addition to declaring all existing ordinances null and void, Section 790.33(3) seeks to impose liability for “any person” who “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.”

12. Section 790.33 was amended effective October 1, 2011, to add several provisions that specifically target and attempt to penalize local elected officials who are deemed to violate the statute (jointly, the “Penalty Provisions”), as follows:

a. Section 790.33(3)(c) provides that if a “court determines that a violation [of Section 790.33] was knowing and willful, the court shall assess a civil fine of up to \$5,000 against the elected or appointed government official or officials or administrative agency head under whose jurisdiction the violation occurred.”

b. Section 790.33(3)(d) provides that “[e]xcept as required by applicable law, public funds may not be used to defend or reimburse the unlawful conduct of any person found to have knowingly and willfully violated this section.”

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

13. Counter-Defendants’ Complaint alleges that Sections 12-61(a) and 13.34(b)(5) of the Tallahassee Code, which concern the discharge of firearms within the City, violate Section 790.33.

14. The Complaint further alleges that, while those ordinances predate the enactment of Section 790.33, the Counter-Plaintiffs – including several elected City Commissioners – violated the preemption statute by failing to vote to repeal the ordinances.

15. Among other things, the Counter-Defendants seek an order that these individual City Commissioners, based on their failure to put to a vote a resolution to repeal preexisting city ordinances, be personally penalized under the Penalty Provisions, including the assessment of civil fines, the denial of public funds to defend themselves in this action, and such further relief as the Court deems necessary and proper.

COUNT I: DECLARATORY RELIEF

16. Paragraphs 1 through 15 are incorporated by reference as if set out in full.

17. The Penalty Provisions violate the United States and Florida Constitutions.

Penalty Provisions Violate Legislative Immunity

18. The Penalty Provisions purport to abrogate the absolute immunity from suit afforded legislators, for legislative acts, under the United States and Florida Constitutions.

19. In Bogan v. Scott-Harris, 523 U.S. 44 (1998), the United States Supreme Court unanimously held that local legislators, like federal, state and regional legislators, are entitled to absolute immunity from civil liability for their legislative activities and stated: “Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability.” Id. at 52.

20. Similarly, the Florida Supreme Court has held that it is beyond question that “absolute immunity in this State extends to county and municipal officials in legislative or quasi-legislative activities.” McNayr v. Kelly, 184 So. 2d 428, 430 (Fla. 1966).

21. The state and federal courts have repeatedly held that under no circumstances may an elected official be personally penalized for his or her official votes.

22. For example, in Yeldell v. Cooper Green Hospital Inc., 956 F.2d 1056 (11th Cir. 1992), the court held that legislative immunity shielded county commissioners from claims that they refused to introduce legislation for a vote. As the court explained:

[T]he decision whether or not to introduce legislation is one of the most purely legislative acts there is To conclude otherwise would require us to ignore the central purpose of the doctrine of legislative immunity. Legislative immunity evolved as a measure to protect the democratic integrity of the legislative process by guaranteeing that the other branches of government would not be able to exert und[ue] influence over the decisions of democratically elected officials. When individuals can sue members of a legislative body to ensure that a certain piece of legislation is brought before that body for a vote, the process is no longer democratic.

Id. at 1063.

23. Similarly, in P.C.B. Partnership v. City of Largo, 549 So. 2d 738 (Fla. 2d DCA 1989), the court affirmed the dismissal of claims against city officials who had voted against

certain development plans and stated: “We can easily dispose of the issues regarding the liability of the individual appellees. City council members enjoy absolute immunity in civil rights actions when acting in a legislative capacity.” Id. at 740.

Penalty Provisions Violate Right of Free Expression

24. The Penalty Provisions also violate municipal legislators’ rights of free expression under the First Amendment of the United States Constitution, and Art. I, Sec. 4 of the Florida Constitution.

25. An elected official’s right to vote (or, in the immediate case, to decline to vote) on legislation plainly falls within his or her constitutional free speech rights.

26. “[T]he act of voting on public issues by a member of a public agency or board comes within the freedom of speech guarantee of the First Amendment. This is especially true when the agency members are elected officials. There can be no more definite expression of opinion than by voting on a controversial public issue.” Miller v. Town of Hull, 878 F.2d 523, 532 (1st Cir. 1989); accord Bond v. Floyd, 385 U.S. 116, 135-36 (1966).

27. The Penalty Provisions are particularly suspect because they allow an elected official to be punished for the content of his or her speech. As the United States Supreme Court has held, heightened scrutiny is required “whenever the government creates ‘a regulation of speech because of disagreement with the message it conveys.’” Sorrell v. IMS Health, 131 S. Ct. 2653, 2664 (2011) (citation omitted). Here, the Penalty Provisions specifically target for personal liability particular votes (or, according to Counter-Defendants, declinations to vote), based wholly on the message conveyed by such voting activity. Thus, the Penalty Provisions cannot stand.

Penalty Provisions Are Unconstitutionally Overbroad

28. The Penalty Provisions are also unconstitutionally overbroad in violation of the United States Constitution's First Amendment and Art. I, Sec. 4 of the Florida Constitution.

29. The overbreadth rule "prohibits the [State] from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process." State v. Catalano, 104 So. 3d 1069, 1077 (Fla. 2012) (citing Ashcroft v. Free Speech Coal., 535 U.S. 234, 237 (2002)).

30. Here, the Penalty Provisions may deter elected representatives from voting on otherwise protected matters by raising the specter of un-immunized civil suit, fines, and removal for routine legislative activity.

31. For instance, a city commissioner could fear that voting on a neutral noise or zoning ordinance could be characterized by private plaintiffs as a regulation of firearms, subjecting him to personal liability and legal fees, even though, if challenged, the ordinance would not be found to violate Section 790.33.

Penalty Provisions Are Impermissibly Vague

32. For many of the same reason they are overbroad, the Penalty Provisions are also impermissibly vague under the Due Process Clause of the Fourteenth Amendment and Art. I, Sec. 9 of the Florida Constitution. See Sult v. State, 906 So. 2d 1013, 1020 (Fla. 2005) (a statute is "void for vagueness when, because of its imprecision, it fails to give adequate notice of what conduct is prohibited."); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

Elements for Declaratory Judgment Are Satisfied

33. Counter-Plaintiffs have been sued in this Court by Counter-Defendants for alleged violations of Section 790.33.

34. There exists a bona fide, actual, and present need for a declaration of the rights and obligations of the parties in this matter.

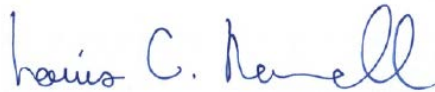
35. There is a present and ascertainable controversy which requires resolution, namely the validity of the Penalty Provisions under the United States and Florida Constitutions.

36. The parties to this action have actual, present, and adverse interests in this matter.

37. As this Counterclaim challenges the constitutionality of a state statute, the Counter-Plaintiffs are serving this pleading on the Florida Attorney General in accordance with the Florida Rules of Civil Procedure to allow her the opportunity to intervene and defend the statute.

38. No other parties are necessary for resolution of the issues in this case before the Court.

WHEREFORE, Counter-Plaintiffs request a declaratory judgment declaring the rights and obligations of the parties, and specifically whether the Penalty Provisions violate the United States and Florida Constitutions for the reasons set forth above.



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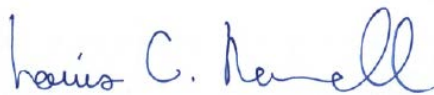
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of August, 2014, a copy of the foregoing pleading was served on the following via email:

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