

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Rules

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BILL: SB 1884

INTRODUCER: Senator Rodrigues

SUBJECT: Preemption of Firearms and Ammunition Regulation

DATE: April 19, 2021

REVISED: \_\_\_\_\_

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	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Paglialonga</u>	<u>Ryon</u>	<u>CA</u>	<b>Favorable</b>
2.	<u>Ravelo</u>	<u>Cibula</u>	<u>JU</u>	<b>Favorable</b>
3.	<u>Paglialonga</u>	<u>Phelps</u>	<u>RC</u>	<b>Pre-meeting</b>

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**I. Summary:**

SB 1884 revises the Legislature’s preemption of the field of the regulation of firearms and ammunition. Current law provides a person or certain organizations with the right to seek declaratory or injunctive relief and actual damages due to a local ordinance, regulation, measure directive, rule enactment, order, or policy regulating firearms or ammunition. The bill provides that the right to maintain a legal action against a preempted local regulation applies even if the local regulation is unwritten.

Existing s. 790.33, F.S., preempts the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the state. Any person or organization whose membership is adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated in violation of s. 790.33 F.S., may file suit against the governmental entity for a declaratory judgment and injunctive relief. If a court determines the plaintiff is the prevailing party, the plaintiff may recover actual damages of up to \$100,000 in addition to any attorney fees.

The bill also provides a mechanism for a plaintiff to recover damages and attorney’s fees when a government entity changes its regulation while the regulation is being challenged under s. 790.33, F.S. Specifically, when a government entity voluntarily changes the regulation that was challenged pursuant to a complaint, the plaintiff challenging that regulation is considered the prevailing party and may recover actual damages and attorney fees.

The bill takes effect July 1, 2021.

## II. Present Situation:

### Home Rule Powers and Preemption

#### *The Florida Constitution*

The Florida Constitution establishes and describes the duties, powers, structure, function, and limitations of government in this state. Article VIII, section 1 of the Florida Constitution, endows counties and municipalities the power of self-government or home rule power. Under the home rule power, local governments have broad authority to exercise the state's sovereign police powers and legislate on any matter that is not inconsistent with the federal and state constitution and laws.

#### *Counties*

A county without a charter has such power of self-government as provided by general or special law and may enact county ordinances not inconsistent with general law.<sup>1</sup> Counties operating under county charters have all the powers of local self-government not inconsistent with general law or with special law approved by a vote of the electors.<sup>2</sup> General law authorizes counties “the power to carry on county government”<sup>3</sup> and to “perform any other acts not inconsistent with law, which acts are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.”<sup>4</sup>

#### *Municipalities*

Municipalities may be established or abolished, and their charters amended by general or special law. Municipalities have governmental, corporate, and proprietary powers to conduct municipal government, perform municipal functions, and render municipal services. They may exercise any of these powers for municipal purposes except as otherwise provided by law.<sup>5</sup> Chapter 166, F.S., also known as the Municipal Home Rule Powers Act,<sup>6</sup> acknowledges these constitutional grants of police powers and better defines municipal powers of self-government.<sup>7</sup> Chapter 166, F.S., provides municipalities with broad home rule powers to act in a manner not inconsistent with the Florida Constitution, general and special law, or the charter for the county in which the municipality is located.<sup>8</sup>

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<sup>1</sup> FLA. CONST. art. VIII, s. 1(f).

<sup>2</sup> *Id.* at (g).

<sup>3</sup> Section 125.01(1), F.S.

<sup>4</sup> *Id.* at (w).

<sup>5</sup> FLA. CONST. art. VIII, s. 2.

<sup>6</sup> Section 166.011, F.S.

<sup>7</sup> Florida House of Representatives, Publications, *The Local Government Formation Manual 2017-2018*, p. 16, available at <http://www.myfloridahouse.gov/Sections/Documents/loadoc.aspx?PublicationType=Committees&CommitteeId=2911&Session=2017&DocumentType=General Publications&FileName=2017-2018 Local Government Formation Manual Final Pub.pdf>. (last visited Mar. 11, 2021).

<sup>8</sup> Section 166.021(4), F.S.

### ***State Preemption***

Although local governments have broad home rule powers, the Legislature may preempt this self-government power and preclude local governments from exercising legislative authority in particular areas of law.<sup>9</sup> Florida law recognizes two types of preemption: express and implied.

Express preemption requires a specific legislative statement; it cannot be implied or inferred.<sup>10</sup> In cases where the Legislature expressly preempts an area or forbids local governments from certain actions, the Legislature must use clear language stating its intent so that “there is no problem with ascertaining what the Legislature intended.”<sup>11</sup> On the other hand, implied preemption is found where the local legislation would present the danger of conflicting with the state’s pervasive regulatory scheme.<sup>12</sup> Preemption of a local government enactment is implied only where the legislative scheme is so pervasive as to evidence an intent to preempt the particular area to the state, and there are strong public policy reasons for doing so.<sup>13</sup> In cases determining the validity of ordinances enacted in the face of express and implied state preemption, the effect has been to find such ordinances null, void, and unenforceable.<sup>14</sup>

### **The Joe Carlucci Uniform Firearms Act**

The Joe Carlucci Uniform Firearms Act (Act), codified in s. 790.33, F.S., became law in 1987.<sup>15</sup> The policy and intent of the Act is stated as follows:

It is the intent of this section to provide uniform firearms laws in the state; to declare all ordinances and regulations null and void which have been enacted by any jurisdictions other than state and federal, which regulate firearms, ammunition, or components thereof; to prohibit the enactment of any future ordinances or regulations relating to firearms, ammunition, or components thereof unless specifically authorized by this section or general law; and to require local jurisdictions to enforce state firearms laws.<sup>16</sup>

The Act accomplished its stated purpose by “occupying the whole field of regulation of firearms and ammunition,” as stated in subsection (1) of the Act:

PREEMPTION.—Except as expressly provided by the State Constitution or general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county,

<sup>9</sup> Wolf, *The Effectiveness of Home Rule: A Preemptions and Conflict Analysis*, 83 Fla. B.J. 92 (June 2009).

<sup>10</sup> See *City of Hollywood v. Mulligan*, 934 So.2d 1238, 1243 (Fla. 2006); *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So.2d 1011, 1018 (Fla. 2d DCA 2005), approved in *Phantom of Brevard, Inc. v. Brevard County*, 3 So.3d 309 (Fla. 2008).

<sup>11</sup> *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 886 (Fla. 2010).

<sup>12</sup> See *GLA & Assocs., Inc. v. City of Boca Raton*, 855 So. 2d 278, 282 (Fla. 4th DCA 2003).

<sup>13</sup> *Id.*

<sup>14</sup> *Thomas v. State*, 614 So.2d 468, 470 (Fla.1993); *Hillsborough County v. Fla. Rest. Ass'n*, 603 So.2d 587, 591 (Fla. 2d DCA 1992) (“If [a county] has enacted such an inconsistent ordinance, the ordinance must be declared null and void.”)

<sup>15</sup> Chapter 87-23, Laws of Fla.

<sup>16</sup> Section 790.33(3)(a), F.S.

city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void.<sup>17</sup>

Since 1990 there has been a statewide 3-day waiting period as outlined in Florida's Constitution.<sup>18</sup> In 2011, the Legislature substantially amended the Act to provide an updated statutory overlay to the constitutional provisions addressing firearms.<sup>19</sup> These revisions included various express prohibitions and exceptions.<sup>20</sup>

Despite the provisions of the 1987 Joe Carlucci Act and a Florida appellate court opinion upholding the Act,<sup>21</sup> local governments have enacted or considered enacting ordinances that required trigger locks, prohibited concealed carry permit holders from lawfully carrying their firearms on municipal or county property, required special use permits for certain sporting goods stores, and banned recreational shooting. Courts have continuously struck down these local regulations as violations of the Act's express state preemption in the field of firearms.<sup>22</sup>

### ***Liability, Recovery, and Attorney Fees***

The Act also includes provisions related to a party's liability that violates the Act's express state preemption. Any person, county, agency, municipality, district, or other entity that violates the state's express preemption in the field of firearms, the Act directs courts to declare the improper ordinance, regulation, or rule invalid and issue a permanent injunction enjoining its enforcement.<sup>23</sup> If a court determines that the violation was knowing and willful, the elected or appointed official having jurisdiction may be assessed a civil fine of up to \$5,000 (that may not be paid with public funds) and may be terminated or removed from the position.<sup>24</sup>

Furthermore, any person or an organization whose membership is adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or caused to be enforced in violation of the Act may sue the violator for a declaratory judgment, injunctive relief, and actual damages caused by the violation. If the plaintiff prevails in the suit, the Act directs a court to award reasonable attorney's fees and costs, including a contingency fee multiplier and actual damages up to \$100,000.<sup>25</sup>

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<sup>17</sup> Section 790.33(1), F.S.

<sup>18</sup> There shall be a mandatory period of 3 days, excluding weekends and legal holidays, between the purchase and delivery at retail of any handgun. For the purposes of this section, "purchase" means the transfer of money or other valuable consideration to the retailer, and "handgun" means a firearm capable of being carried and used by one hand, such as a pistol or revolver. Holders of a concealed weapon permit as prescribed in Florida law shall not be subject to the provisions of this paragraph. ... This restriction shall not apply to a trade in of another gun. FLA. CONST. art. I, s. 8(b), 8(d).

<sup>19</sup> Chapter 2011-109, Laws of Fla.

<sup>20</sup> Section 790.33(3)(4), F.S.

<sup>21</sup> *National Rifle Association v. City of South Miami*, 812 So. 2d 504 (Fla. 3d DCA 2002).

<sup>22</sup> See *Jensen v. Pinellas County*, 198 So.3d 754 (Fla. 2nd DCA 2016); see also *Florida Carry, Inc. v. University of Florida*, 180 So.3d 137 (Fla. 1st DCA 2015).

<sup>23</sup> Section 790.33(3)(b), F.S.

<sup>24</sup> *Id.* at (c), (d), and (e).

<sup>25</sup> *Id.* at (f).

Not every preempted regulation will necessarily provide for an opportunity to infer liability or recover any attorney's fees based on a suit. The City of Tallahassee, for example, has several firearms related ordinances that a court recently found "null and void, even if they ostensibly remained on the books" due to preemption.<sup>26</sup> The court, however, refused to issue attorney's fees and costs on behalf of the petitioner, Florida Carry Inc., because the actual regulations were not enforced. The city merely republished the already void ordinances, which the court found was not an actionable offense under s. 790.33, F.S.<sup>27</sup>

### III. Effect of Proposed Changes:

The bill amends s. 790.33, F.S., to provide that a person or organization whose membership is adversely affected by a local regulation of firearms or ammunition that violates s. 790.33, F.S., may file suit even if the regulation is *unwritten*. Under current law, a person may challenge a local regulation based on a specific ordinance, regulation, measure, directive, rule, enactment, order, or policy. Successfully prosecuting a case may prove difficult, however, if the government entity's regulation was not made in writing.

The bill also provides that if the governmental entity defendant to a complaint alleging a violation of s. 790.33, F.S., voluntarily changes the ordinance, regulation, measure, directive, rule, enactment, order, or policy, written or unwritten, allegedly in violation of s. 790.33, F.S., the plaintiff is considered a prevailing plaintiff, with or without court action. As the prevailing party, the plaintiff may recover actual damages and attorney fees. This provision appears to address the issue of *mootness*. If a government agency were to change a regulation that is being challenged as a violation of state preemption prior to the conclusion of the litigation, the potential violation may be dismissed as *moot* because it is no longer in place.<sup>28</sup> Once dismissed as moot, the plaintiff would not be eligible to recover damages or attorney's fees despite the government entity changing what was challenged. When this scenario occurs under the bill, however, the plaintiff is considered the prevailing party for the purpose of actual damages and attorney's fees.

The bill takes effect July 1, 2021.

### IV. Constitutional Issues:

#### A. Municipality/County Mandates Restrictions:

None.

#### B. Public Records/Open Meetings Issues:

None.

<sup>26</sup> *Florida Carry, Inc. v. City of Tallahassee*, 212 So. 3d 452, (Fla. 1st DCA 2017).

<sup>27</sup> *Id.* at 464-5.

<sup>28</sup> In a case involving the University of Florida, for example, a court held there was no "justiciable controversy" when the University no longer enforced the regulation being challenged. *Florida Carry, Inc. v. Univ. of Florida*, 180 So. 3d 137, 153-4 (Fla. 1st DCA 2015). See also *Godwin v. State*, 593 So. 2d 211 (Fla. 1992) ("An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect.")

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None identified.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

SB 1884 may have an indeterminate net positive fiscal impact for persons and organizations adversely affected by a local government's unwritten action regarding the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation of firearms and ammunition.

The bill also may have an indeterminate net positive fiscal impact on plaintiffs challenging actions as violating s. 790.33, F.S. Under the bill, these plaintiffs may more easily recover attorney fees and actual damages by being declared the prevailing party if a defendant voluntarily changes the policy allegedly violating s. 790.33, F.S., after a complaint is filed.

**C. Government Sector Impact:**

The bill may cause an indeterminate net negative fiscal impact on government entities that violate s. 790.33, F.S., by providing that a plaintiff may recover attorney fees and actual damages if the governmental entity voluntarily changes the alleged violation.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

It is difficult to determine the nature of the unwritten policies covered by the bill. Unwritten policies may include oral instructions given within a law enforcement agency.<sup>29</sup>

<sup>29</sup> See *Dougan v. Bradshaw*, 198 So. 3d 878 (Fla. 4th DCA 2016)(The Sheriff argued that a cause of action under s. 790.33, F.S., could not be maintained because the "policy" alleged in Appellant's complaint—i.e. retaining firearms seized as a result of a safety call or safety check until ordered by the court to return them—was an oral instruction pursuant to an Administrative Order and not a "policy" within the meaning of s. 790.33 F.S.).

**VIII. Statutes Affected:**

This bill substantially amends section 790.33 of the Florida Statutes.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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