

**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.)

---

Prepared By: The Professional Staff of the Committee on Criminal Justice

---

BILL: SB 300

INTRODUCER: Senator Gaetz

SUBJECT: Weapons and Firearms

DATE: October 19, 2015

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	<b>Pre-meeting</b>
2.			JU	
3.			RC	

---

**I. Summary:**

SB 300 creates s. 776.00111, F.S., which states that the right to bear arms is a fundamental and individual right that exists in any place that a person has the right to be.

The new section of law requires the courts to use the highest standard of constitutional review, strict scrutiny, when analyzing any statute that implicates the right to bear arms or to defend one's self, defend others, or defend property.<sup>1</sup>

The bill amends s. 790.053(1), F.S., to authorize concealed carry licensees to openly carry firearms or weapons.

The bill adds a new subsection (4) to s. 790.053, F.S., which specifies that, unless probable cause exists to believe that a crime has been committed by an individual, any person or entity infringing upon the rights conferred on that individual by ch. 790<sup>2</sup>, F.S., ch. 776<sup>3</sup>, F.S., s. 8, Art. I of the State Constitution<sup>4</sup>, or the Second Amendment to the United States Constitution<sup>5</sup> is liable for certain damages, fines, and perhaps the loss of employment.

The new subsection (4) also provides that no immunity shall apply to persons infringing on such rights in violation of this subsection.

---

<sup>1</sup> The Florida Supreme Court has stated, "To withstand strict scrutiny, a law must be necessary to promote a compelling governmental interest and must be narrowly tailored to advance that interest. ... Strict scrutiny requires the State to demonstrate that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *State v. T.M.*, 907 So.2d 1101 (Fla. 2004)(citations omitted).

<sup>2</sup> "Weapons and Firearms."

<sup>3</sup> "Justifiable Use of Force."

<sup>4</sup> Florida right to keep and bear arms provision.

<sup>5</sup> Federal right to keep and bear arms provision.

Section 790.02, F.S., authorizes an officer who is authorized to make arrests to make a warrantless arrest for the carrying of a concealed weapon in violation of s. 790.01, F.S., when the officer has reasonable grounds or probable cause to believe such offense has been committed. The bill provides that s. 790.02, F.S., should apply to the *unlicensed* carrying of a concealed weapon and that warrantless arrests may only be based upon probable cause.

Finally, the bill contains legislative findings and intent language in s. 790.25(1), F.S.,<sup>6</sup> to:

- Specify that the Legislature finds that the possession and carrying of weapons and firearms by law-abiding individuals for lawful purposes, including self-defense, enhances public safety.
- Require the judiciary to construe this act in conjunction with the right to bear arms or defend one's self as provided in ch. 776, F.S.
- Specify that the right to bear arms and defend one's self is a fundamental and individual right that exists in any place that a person has the right to be, subject only to exceptionally and narrowly tailored restrictions that employ the least possible restriction on the right in order to achieve a compelling government interest.

The bill is effective upon becoming a law.

## II. Present Situation:

### Constitutional Provisions Regarding the Right to Keep and Bear Arms

The Second Amendment of the U.S. Constitution states, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."<sup>7</sup> With respect to this provision, the U.S. Supreme Court has stated that the amendment guarantees "the individual right to possess and carry weapons in case of confrontation."<sup>8</sup> According to the Fourth District Court of Appeals, the amendment encompasses the right to carry a gun both inside and outside the home for self-defense.<sup>9</sup>

Article I, section 8(a) of the Florida Constitution states, "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law." Regarding this provision, the Florida Supreme Court has stated, "Although [sic] the Legislature may not entirely prohibit the right of the people to keep and bear arms, it can determine that certain arms or weapons may not be kept or borne by the citizen. We have specifically held that the Legislature can regulate the use and the manner of bearing certain specific weapons."<sup>10</sup>

---

<sup>6</sup> "Lawful ownership, possession, and use of firearms and other weapons – Declaration of Policy.", s. 790.25(1), F.S.

<sup>7</sup> U.S. Const. Amend. II.

<sup>8</sup> *Dist. of Columbia v. Heller (Heller I)*, 554 U.S. 570, 592 (2008).

<sup>9</sup> *Norman v. State*, 159 So.3d 205, 212 (Fla. 4<sup>th</sup> DCA 2015) pet. for rev. pending, no. SC15-650.

<sup>10</sup> *Rinzler v. Carson*, 262 So.2d 661, 665 (Fla. 1972).

## Statutory Regulation of Firearms, Self Defense, and Standards of Judicial Review

Statutes regarding the bearing of weapons and firearms in Florida have been adopted by the Legislature in ch. 790, F.S., entitled “Weapons and Firearms” and statutes regarding self-defense have been adopted by the Legislature in ch. 776, F.S., entitled “Justifiable Use of Force.”

With respect to judicial review of the constitutionality of Florida’s statutes relating to the right to bear arms for self-defense, the Fourth District Court of Appeals in *Norman v. State*, recently held that *intermediate, rather than strict, scrutiny* is the applicable standard for judicial review of regulations that do not “destroy the core right of self-defense enshrined in the Second Amendment.”<sup>11</sup>

- Intermediate scrutiny “require[s] (1) the government’s stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective,”<sup>12</sup>
- “[S]trict scrutiny requires the Government to prove that [a challenged law] ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”<sup>13</sup>

Under the intermediate scrutiny standard, the *Norman* court upheld the constitutionality of s. 790.053, F.S., which prohibits the open carrying of certain firearms and weapons, agreeing with the state’s assertion that it had a paramount interest in public safety which was furthered by the ban on open carry and finding that a reasonable fit existed between the challenged law and the state’s asserted objectives.<sup>14</sup>

## Standard of Judicial Review in Other States

In at least three other states, strict scrutiny requirements for the review of restrictions on the right to bear arms have recently been adopted as constitutional amendments:

- Article 1, section 11 of the Louisiana Constitution, now provides after the amendment approved November 6, 2012, “The right of each citizen to keep and bear arms is fundamental and shall not be infringed. Any restriction on this right shall be subject to strict scrutiny.”<sup>15</sup>
- Article 1, section 23 of the Missouri Constitution provides, “That the right of every citizen to keep and bear arms, ammunition, and accessories typical to the normal function of such arms, in defense of his home, person, family and property, or when lawfully summoned in aid of the civil power, shall not be questioned. The rights guaranteed by this section shall be unalienable. Any restriction on these rights shall be subject to strict scrutiny and the state of Missouri shall be obligated to uphold these rights and shall under no circumstances decline to protect against their infringement. Nothing in this section shall be construed to prevent the

---

<sup>11</sup> *Norman*, 159 So.3d at 220-222.

<sup>12</sup> *Id.* at 220.

<sup>13</sup> *Id.* at 220.

<sup>14</sup> *Id.* at 222-224.

<sup>15</sup> Since the adoption of this amendment, several lower courts have held unconstitutional certain Louisiana statutes that prohibit minors and felons from possessing firearms under the strict scrutiny standard. Each of these rulings has been reversed by a superior Louisiana appellate court. *See, e.g., State v. Draughter*, 130 So.3d 855 (La. 2013); *State of Louisiana in the Interest of J.M.*, 144 So.3d 853 (La. 2014); *State v. Eberhardt*, 145 So.3d 377 (La. 2014); and *State v. Dixon*, 146 So.3d 662 (La.App. 4th Cir. 2014). In other cases, both the lower courts and appellate courts rejected arguments that certain gun regulation statutes are unconstitutional under strict scrutiny review. *See, e.g., State v. Zeno*, 155 So.3d 4 (La.App. 1st Cir. 2014); and *State in Interest of D.V.*, 144 So.3d 1097 (La.App. 4th Cir. 2014).

general assembly from enacting general laws which limit the rights of convicted violent felons or those adjudicated by a court to be a danger to self or others as result of a mental disorder or mental infirmity.”<sup>16</sup>

- Article I, section 26(a) of the Alabama Constitution states: “Every citizen has a fundamental right to bear arms in defense of himself or herself and the state. Any restriction on this right shall be subject to strict scrutiny.”<sup>17</sup>

### **Florida’s Statutes Relating to the Open and Concealed Carry of Weapons and Firearms**

Generally, in Florida, an individual is authorized to own, possess, and lawfully use a firearm and other weapon<sup>18</sup> without a license if the individual is not statutorily prohibited from possessing a firearm or weapon<sup>19</sup> and such possession and use occurs in a lawful manner and location.<sup>20</sup>

#### ***Concealed Carry***

In order to lawfully carry a concealed weapon or concealed firearm,<sup>21</sup> a person, unless exempted, must obtain a license from the Department of Agriculture and Consumer Services.<sup>22</sup> If a person is unlicensed, s. 790.01, F.S., specifies that it is:

- A first degree misdemeanor<sup>23</sup> for the person to carry a concealed weapon<sup>24</sup> or electric weapon or device<sup>25</sup> on or about his or her person.<sup>26</sup>
- A third degree felony<sup>27</sup> to carry a concealed firearm.<sup>28, 29</sup>

<sup>16</sup> The Missouri Supreme Court recently held that the right to bear arms is a fundamental right and that any law restricting such right is subject to strict scrutiny regardless of whether the pre-amended or amended version of Missouri’s Constitution applies. *Missouri v. Merritt*, No. SC 94096, 2015 WL 4929765, at \*3-4 (August 18, 2015).

<sup>17</sup> There does not appear to be any case law in Alabama discussing the 2014 constitutional amendment.

<sup>18</sup> Section 790.001(13), F.S., defines “weapon” as “any dirk, knife, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon except a firearm or a common pocketknife, plastic knife, or blunt-bladed table knife.”

<sup>19</sup> There are numerous prohibitions in statute specifying individuals who may not lawfully possess a gun. *See, e.g.*, ss. 790.22 and 790.23, F.S., (prohibiting the possession of firearms and certain weapons by minors, convicted felons, and delinquents, except under specified circumstances).

<sup>20</sup> *See* s. 790.25, F.S.

<sup>21</sup> The term “concealed weapons or concealed firearms” is defined as “a handgun, electronic weapon or device, tear gas gun, knife, or billie, but the term does not include a machine gun ...” s. 790.06(1), F.S.

<sup>22</sup> Section 790.06, F.S.

<sup>23</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. ss. 775.082 and 775.083, F.S.

<sup>24</sup> Section 790.001(3)(a), F.S., defines the term “concealed weapon” as “any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or other deadly weapon carried on or about a person in such a manner as to conceal the weapon from the ordinary sight of another person.” The weapons listed in this definition require licensure to carry them in a concealed manner.

<sup>25</sup> Section 790.001(14), F.S., defines the term “electric weapon or device” as “any device which, through the application or use of electrical current, is designed, redesigned, used, or intended to be used for offensive or defensive purposes, the destruction of life, or the infliction of injury.”

<sup>26</sup> Section 790.01(1), F.S.

<sup>27</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082 and 775.083, F.S.

<sup>28</sup> Section 790.001(2), F.S., defines the term, “concealed firearm” as “any firearm, as defined in subsection (6), which is carried on or about a person in such a manner as to conceal the firearm from the ordinary sight of another person.”

<sup>29</sup> Section 790.01(2), F.S.

These prohibitions do not apply to:

- A person who carries a concealed weapon, or a person who may lawfully possess a firearm and who carries a concealed firearm, on or about his or her person while in the act of evacuating during certain mandatory evacuation orders.
- A person who carries for purposes of lawful self-defense in a concealed manner:
  - A self-defense chemical spray.<sup>30</sup>
  - A nonlethal stun gun or dart-firing stun gun<sup>31</sup> or other nonlethal electric weapon or device that is designed solely for defensive purposes.<sup>32</sup>

The carrying of a concealed weapon in violation of s. 790.01, F.S., is statutorily designated as a breach of peace for which an officer may make a warrantless arrest if the officer has reasonable grounds or probable cause to believe that the offense of carrying a concealed weapon is being committed.<sup>33</sup>

Licensees are limited with regard to where they may carry a concealed weapon or concealed firearm. Section 790.06(12)(a), F.S., specifies that the license does not authorize a person to openly carry a handgun or carry a concealed weapon or firearm into:

- Any place of nuisance as defined in s. 823.05.
- Any police, sheriff, or highway patrol station.
- Any detention facility, prison, or jail.
- Any courthouse.
- Any courtroom, except that nothing in this section would preclude a judge from carrying a concealed weapon or determining who will carry a concealed weapon in his or her courtroom.
- Any polling place.
- Any meeting of the governing body of a county, public school district, municipality, or special district.
- Any meeting of the Legislature or a committee thereof.
- Any school, college, or professional athletic event not related to firearms.
- Any elementary or secondary school facility or administration building.
- Any career center.
- Any portion of an establishment licensed to dispense alcoholic beverages for consumption on the premises, which portion of the establishment is primarily devoted to such purpose.
- Any college or university facility unless the licensee is a registered student, employee, or faculty member of such college or university and the weapon is a stun gun or nonlethal electric weapon or device designed solely for defensive purposes and the weapon does not fire a dart or projectile.
- The inside of the passenger terminal and sterile area of any airport, provided that no person shall be prohibited from carrying any legal firearm into the terminal, which firearm is

---

<sup>30</sup> Section 790.001(3)(b), F.S., defines the term “self-defense chemical spray” as “a device carried solely for purposes of lawful self-defense that is compact in size, designed to be carried on or about the person, and contains not more than two ounces of chemical.”

<sup>31</sup> Section 790.001(15), F.S., defines the term “dart-firing stun gun” as “any device having one or more darts that are capable of delivering an electrical current.”

<sup>32</sup> Section 790.01(3), F.S.

<sup>33</sup> Section 790.02, F.S.

encased for shipment for purposes of checking such firearm as baggage to be lawfully transported on any aircraft.

- Any place where the carrying of firearms is prohibited by federal law.

A person who knowingly and willfully carries a concealed weapon or firearm into any of the above-listed locations commits a second degree misdemeanor.<sup>34</sup>

### ***Open Carry***

Florida law prohibits the open carrying of firearms and certain weapons unless an exemption applies. Specifically, s. 790.053, F.S., makes it a second degree misdemeanor<sup>35</sup> for a person to openly carry on or about his or her person any firearm or electric weapon or device. This section does not apply to a person who has a license to carry concealed weapons or concealed firearms<sup>36</sup> if the licensee briefly and openly displays the firearm to the ordinary sight of another person, unless “the firearm is intentionally displayed in an angry or threatening manner, not in necessary self-defense.”<sup>37, 38</sup>

### ***Exemptions from Open Carry Prohibitions and Concealed Carry Licensing Requirements***

Section 790.25(3), F.S., provides that certain persons under specified circumstances are exempt from the requirements for a license to carry concealed weapons or concealed firearms in s. 790.06, F.S., and the limitations on open carrying in s. 790.053, F.S. These persons and circumstances include:

- Members of the Militia, National Guard, Florida State Defense Force, Army, Navy, Air Force, Marine Corps, Coast Guard, organized reserves, and other armed forces of the state and of the United States, when on duty, when training or preparing themselves for military duty, or while subject to recall or mobilization.
- Citizens of this state subject to duty under certain sections of law if on duty or when training or preparing themselves for military duty.
- Persons carrying out or training for emergency management duties under ch. 252, F.S.
- Sheriffs, marshals, prison or jail wardens, police officers, Florida highway patrol officers, game wardens, revenue officers, forest officials, special officers appointed under the provisions of ch. 354, F.S., and other peace and law enforcement officers and their deputies and assistants and full-time paid peace officers of other states and of the Federal Government who are carrying out official duties while in this state.
- Officers or employees of the state or United States duly authorized to carry a concealed weapon.
- Guards or messengers of common carriers, express companies, armored car carriers, mail carriers, banks, and other financial institutions, while actually employed in and about the

<sup>34</sup> Section 790.06(12)(d), F.S.

<sup>35</sup> A second degree misdemeanor is punishable by up to 60 days in county jail and a \$500 fine. ss. 775.082 and 775.083, F.S.

<sup>36</sup> The term “concealed weapons or concealed firearms” is defined as “a handgun, electronic weapon or device, tear gas gun, knife, or billie, but the term does not include a machine gun . . .” s. 790.06(1), F.S.

<sup>37</sup> s. 790.053(1), F.S.

<sup>38</sup> Section 790.053(2), F.S., also specifies that a person may openly carry for purposes of lawful self-defense a self-defense chemical spray and a nonlethal stun gun or dart-firing stun gun or other nonlethal electric weapon or device that is designed solely for defensive purposes.

shipment, transportation, or delivery of any money, treasure, bullion, bonds, or other thing of value within this state.

- Regularly enrolled members of any organization duly authorized to purchase or receive weapons from the United States or from this state, or regularly enrolled members of clubs organized for target, skeet, or trap shooting, while at or going to or from shooting practice; or regularly enrolled members of clubs organized for modern or antique firearms collecting, while such members are at or going to or from their collectors' gun shows, conventions, or exhibits.
- A person engaged in fishing, camping, or lawful hunting or going to or returning from a fishing, camping, or lawful hunting expedition.
- A person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person while engaged in the lawful course of such business.
- A person firing weapons for testing or target practice under safe conditions and in a safe place not prohibited by law or going to or from such place.
- A person firing weapons in a safe and secure indoor range for testing and target practice.
- A person traveling by private conveyance when the weapon is securely encased or in a public conveyance when the weapon is securely encased and not in the person's manual possession.
- A person while carrying a pistol unloaded and in a secure wrapper, concealed or otherwise, from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business.
- Investigators employed by the public defenders and capital collateral regional counsel of the state while carrying out official duties.<sup>39</sup>

## Open Carry in Other States

### *States that Generally Permit Open Carry of Firearms*<sup>40</sup>

Forty-three states permit the open carrying of both long guns and handguns.<sup>41</sup> Of these states, 26 do not require a license and do not restrict whether the firearm is loaded or unloaded.<sup>42, 43</sup> Connecticut,<sup>44</sup> Georgia,<sup>45</sup> Maryland,<sup>46</sup> New Hampshire,<sup>47</sup> Rhode Island,<sup>48</sup> and Tennessee<sup>49</sup>

<sup>39</sup> Section 790.25(3), F.S.

<sup>40</sup> "Firearms" refers to both handguns and long guns.

<sup>41</sup> These states are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas (effective January 1, 2016), Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>42</sup> These states include Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, Idaho, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, Ohio, Oregon, South Dakota, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

<sup>43</sup> The status of Arkansas law is based on Attorney General Opinion No. 2015-064 issued August 28, 2015.

<sup>44</sup> CONN. GEN. STAT. §29-35.

<sup>45</sup> GA. CODE ANN. §§16-11-126 and 129(a).

<sup>46</sup> MD. CODE ANN. CRIM. LAW §4-203.

<sup>47</sup> A license is required if carrying a firearm in a vehicle or if carrying a loaded handgun, regardless of whether the firearm is concealed or openly carried. N.H. REV. STAT. ANN. §159:4.

<sup>48</sup> R.I. GEN. LAWS ANN. §11-47-18.

<sup>49</sup> A license is only required if openly carrying a *loaded* handgun. TENN. CODE ANN. §§39-17-1308 and 1351.

require a license to openly carry a handgun, but not a long gun, such as a rifle or shotgun. Conversely, Massachusetts,<sup>50</sup> Minnesota,<sup>51</sup> New Jersey,<sup>52</sup> Texas,<sup>53</sup> and Utah<sup>54</sup> require a license to openly carry any firearm.

The remaining six states permit open carry, but impose special limitations on the circumstances in which a person can openly carry a firearm.<sup>55</sup> For example, North Dakota limits the hours during which an unlicensed person may openly carry an unloaded handgun.<sup>56</sup>

Three states permit openly carrying specific types of firearms. South Carolina<sup>57</sup> permits openly carrying a long gun without a license, while prohibiting openly carrying a handgun in any circumstance. Hawaii<sup>58</sup> permits openly carrying a handgun with a license and prohibits openly carrying a long gun in any circumstance. Oklahoma<sup>59</sup> permits openly carrying a handgun with a license and prohibits openly carrying a long gun in most circumstances.

Some states regulate the manner of openly carrying a handgun. For example in Texas, licensees must carry the handgun in a shoulder or belt holster.<sup>60</sup> In Oklahoma, licensees may carry a “unconcealed handgun,” which means, “a loaded or unloaded pistol carried upon the person in a belt holster or shoulder holster that is wholly or partially visible, or carried upon the person in a scabbard or case designed for carrying firearms that is wholly or partially visible.”<sup>61</sup>

### ***States that Prohibit Open Carry***

The District of Columbia,<sup>62</sup> Florida,<sup>63</sup> Illinois,<sup>64</sup> and New York,<sup>65</sup> prohibit the open carry of both handguns and long guns. California does not statutorily prohibit the open carrying of all firearms; however, the restrictions on openly carrying a firearm in the state result in very limited ability to openly carry.<sup>66</sup>

<sup>50</sup> MASS. GEN. LAWS ch. 140 §131.

<sup>51</sup> MINN. STAT. ANN. §§624.714 and 7181.

<sup>52</sup> A license is required to carry a handgun in an open or concealed manner. N.J. STAT. ANN. §2C:39-5(b). A license is also required to openly carry an *unloaded* long gun. Loaded long guns may not be openly carried. N.J. STAT. ANN. §2C:39-5(c) and §2C:58-3.

<sup>53</sup> TEX. PENAL CODE ANN. §46.02 and 46.15(b).

<sup>54</sup> A person may not carry a loaded firearm openly or concealed in most places. UTAH CODE ANN. §76-10-505. However, this restriction does not apply to holders of a concealed weapon license issued under UTAH CODE ANN. §53-5-704. UTAH CODE ANN. §76-10-523(2)(a).

<sup>55</sup> Indiana, Iowa, Missouri, Ohio, Oregon, and Pennsylvania.

<sup>56</sup> N.D. CENT CODE ANN. §62.1-03-01.

<sup>57</sup> S.C. CODE ANN. §16-23-20.

<sup>58</sup> HAW. REV. STAT. §§134-9 and 134-25.

<sup>59</sup> OKLA. STAT. ANN. tit. 21, §§1290.5 and 1289.6.

<sup>60</sup> TEX. PENAL CODE ANN. §46.02(a-1) (effective January 1, 2016).

<sup>61</sup> OKLA. STAT. ANN. tit. 21, §§1290.2 and 1290.8.

<sup>62</sup> D.C. CODE §22-4504.01.

<sup>63</sup> Section 790.053, F.S.

<sup>64</sup> ILL. COMP. STAT. 5/24-1(a)(4).

<sup>65</sup> N.Y. PENAL §265.01.

<sup>66</sup> It is illegal to carry any loaded firearm in an open or concealed manner, CAL. PENAL §25850, or to openly carry an unloaded handgun, CAL. PENAL §26350, in any public place in an incorporated city or on a public street in any prohibited area of an unincorporated territory.

## Legislative Preemption of the Regulation of Firearms and Ammunition

In s. 790.33(1), F.S., the Florida Legislature has preempted “the whole field of regulation of firearms<sup>67</sup> and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof.” Local government authority to regulate firearms and ammunition is prohibited, “except as otherwise expressly provided by the State Constitution or general law....”<sup>68, 69</sup>

Section 790.33(3), F.S., specifies that any person, county, agency, municipality, district, or other entity that violates the preemption by enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon such exclusive occupation of the field is subject to the following liability:

- The court is required to 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. Acting in good faith or upon advice of counsel is not a defense.
- If the court determines that a violation was knowing and willful, the court must assess a civil fine of up to \$5,000 against the elected or appointed local government official or officials or administrative agency head under whose jurisdiction the violation occurred. Additionally, a knowing and willful violation by a person acting in an official capacity for any entity that commits a violation is cause for termination of employment or contract or removal from office by the Governor.
- A county, agency, municipality, district, or other entity is liable to a prevailing plaintiff for actual damages, up to \$100,000, and attorney fees and costs, including a contingency fee multiplier, if the plaintiff is found to have been adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or caused to be enforced in violation of the preemption.
- Unless 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 committed a violation.<sup>70</sup>

Section 790.33(4), F.S., states that the section does not prohibit:

- Certain zoning ordinances that encompass firearms businesses along with other businesses.
- A law enforcement agency from enacting and enforcing regulations pertaining to firearms, ammunition, or firearm accessories issued to or used by peace officers in the course of their official duties.
- Any entity subject to the section from regulating or prohibiting the carrying of firearms and ammunition by an employee of the entity during and in the course of the employee’s official duties, except as provided in s. 790.251, F.S., relating to the protection of the right to keep and bear arms in motor vehicles for self-defense and other lawful purposes.

---

<sup>67</sup> Section 790.001(6), F.S., defines the term “firearm” as “any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term ‘firearm’ does not include an antique firearm unless the antique firearm is used in the commission of a crime.”

<sup>68</sup> Section 790.33(1), F.S.

<sup>69</sup> The Legislature has expressly authorized local government regulation of the location and construction of a sport shooting range. s. 823.16(7), F.S.

<sup>70</sup> Section 790.33(3), F.S.

- A court or administrative law judge from hearing and resolving any case or controversy or issuing any opinion or order on a matter within the jurisdiction of that court or judge.
- The Florida Fish and Wildlife Conservation Commission from regulating the use of firearms or ammunition as a method of taking wildlife and regulating the shooting ranges managed by the commission.

### III. Effect of Proposed Changes:

#### Courts Required to Use Strict Scrutiny

The bill creates s. 776.00111, F.S., to require the courts to use the strict scrutiny standard of review when analyzing any statute that implicates the right to bear arms or defend one's self pursuant to ch. 776, F.S. Chapter 776, F.S., contains the Justifiable Use of Force (or Self Defense) laws.<sup>71</sup> Strict scrutiny is the highest standard of constitutional review.

The new section of law further states that the right to bear arms is a fundamental and individual right that exists in any place that a person has the right to be, subject only to "exceptionally and narrowly tailored restrictions that employ the least possible restriction on the right in order to achieve a compelling government interest." This language is similar to, but not exactly like the language used by Florida courts when describing the requirements of strict scrutiny review.<sup>72</sup>

#### Unlicensed Concealed Carry Warrantless Arrest

The bill amends s. 790.02, F.S., which authorizes an officer who is authorized to make arrests to make a warrantless arrest for the carrying of a concealed weapon in violation of s. 790.01, F.S., when the officer has reasonable grounds or probable cause to believe such offense has been committed. The amendment clarifies that s. 790.02, F.S., should apply to the *unlicensed* carrying of a concealed weapon. It also eliminates statutory authorization for warrantless arrests based on reasonable grounds. Under the bill, *warrantless arrests may only be based upon probable cause.*

#### Open Carry Authorized

The bill amends s. 790.053(1), F.S., to authorize *concealed carry licensees to openly carry* firearms or weapons, including electric weapons or devices. The term "openly carry" is not defined. There is no new licensing or training requirement, for current or future license-holders, prescribed in association with the open carry provision.

#### Liability for Infringement of Rights

The bill adds a new subsection (4) to s. 790.053, F.S., which specifies that, "Unless probable cause exists to believe that a crime has been committed by an individual, *any person or entity*

<sup>71</sup> Some of the sections in ch. 776, F.S., are commonly known as the "Stand Your Ground" law.

<sup>72</sup> In *Norman v. State*, the Fourth District described strict scrutiny as requiring, "the Government to prove that [a challenged law] 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Norman*, 159 So.3d at 220. The Florida Supreme Court has stated, "To withstand strict scrutiny, a law must be necessary to promote a compelling governmental interest and must be narrowly tailored to advance that interest. ... Strict scrutiny requires the State to demonstrate that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means." *State v. T.M.*, 907 So.2d 1101 (Fla. 2004)(citations omitted).

infringing upon the rights conferred on that individual by this chapter, chapter 776, s. 8, Art. I of the State Constitution, or the Second Amendment to the United States Constitution is “*liable*” pursuant to s. 790.33(3)(c), (d), (e), and (f).<sup>73</sup>

It is not entirely clear whether the bill creates a *new cause of action* against *any* person or entity *beyond* those people and governmental entities described in s. 790.33(3), F.S.

The bill’s intent *may* be to apply the “penalties” set forth in s. 790.33(3)(c)-(f), F.S., in cases where *those listed persons*<sup>74</sup> are found to have infringed upon the right to keep and bear arms and the right to defend oneself (others and property) rather than creating a new cause of action against *any* person or entity.

### **No Immunity in Cases of Infringement of Rights**

This new subsection (4) also states, “Notwithstanding any other law, *no immunity* shall apply to persons infringing on such rights in violation of this subsection.”

Law emanating from federal and state statutes, court decisions, and the common law affords a variety of immunities from liability. For example, s. 768.28(9), F.S., provides that an officer, employee, or agent of the state or its subdivisions may not be held personally liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment, unless certain exceptions apply.

Prosecutorial and judicial immunity derived from the common law is afforded to prosecutors and judges because “a strict guarantee of immunity is necessary to preserve the effectiveness and impartiality of judicial and quasi-judicial offices.”<sup>75</sup> Qualified or absolute immunity in actions under 42 U.S.C. s. 1983, for a deprivation of civil rights is afforded to legislative, executive, and judicial branch government officials under certain circumstances.<sup>76</sup>

<sup>73</sup> As previously discussed s. 790.33(3)(c) through (f), F.S., provide for:

- A civil fine of up to \$5,000 and possible termination of employment or contract or removal from office by the Governor and
- Actual damages, up to \$100,000, and attorney fees and costs, including a contingency fee multiplier, if the plaintiff is found to have been adversely affected by any ordinance, regulation, measure, directive, rule, enactment, order, or policy promulgated or caused to be enforced in violation of the preemption.

<sup>74</sup> Sections 790.33(3)(c)-(f), F.S., identify the following persons and entities that may not violate the Legislature’s preemption of the “whole field of regulation of firearms and ammunition”:

- Elected or appointed local government official
- Administrative agency head and
- Person acting in an official capacity for an entity enacting or causing to be enforced a prohibited local ordinance or administrative rule or regulation.

<sup>75</sup> *Office of State Attorney, Fourth Judicial Circuit of Florida v. Parrotino*, 628 So.2d 1097, 1098-1099 (Fla. 1993).

<sup>76</sup> See, e.g., *Junior v. Reed*, 693 So.2d 586 (1st DCA 1997); *Greason v. Kemp*, 891 F.2d 829, 833 (11th Cir.1990); and *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

### **Legislative Findings, Intent**

Finally, the bill amends s. 790.25, F.S., to:

- Specify that the Legislature finds that the possession and carrying of weapons and firearms by law-abiding individuals for lawful purposes, including self-defense, enhances public safety.
- Require the judiciary to construe this act in conjunction with the right to bear arms or defend one's self as provided in ch. 776, F.S.
- Specify that the right to bear arms and defend one's self is a fundamental and individual right that exists in any place that a person has the right to be, subject only to exceptionally and narrowly tailored restrictions that employ the least possible restriction on the right in order to achieve a compelling government interest.

### **IV. Constitutional Issues:**

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

None.

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

None.

#### **C. Trust Funds Restrictions:**

None.

#### **D. Other Constitutional Issues:**

#### **The Bill's Waiver of Immunity Provisions**

The bill's waiver of immunity when a violation of the new subsection (4) to s. 790.053, F.S., occurs may be challenged on the theory that it violates the separation of powers or the supremacy clause.

The Florida Supreme Court has held that it is a violation of the Separation of Powers Doctrine set forth in Article II, Section 3 of the Florida Constitution for the Legislature to waive prosecutorial or judicial immunity.<sup>77</sup> If the bill were construed to waive a federal law immunity, legal challenges might be brought based on an argument that such waiver violates the Supremacy Clause set forth in Article VI, Clause 2 of U.S. Constitution.<sup>78</sup>

<sup>77</sup> The Florida Supreme Court has stated, "While the legislature has authority to waive immunity for those organs of government within its purview, the legislature cannot take actions that would undermine the independence of Florida's judicial and quasi-judicial offices. This would violate the doctrine of separation of powers. Art. II, § 3, Fla. Const." *Office of State Attorney, Fourth Judicial Circuit of Florida*, 628 So.2d at 1099.

<sup>78</sup> The Florida Supreme Court has stated, "Under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, state laws may be preempted by federal laws in three situations: (1) where express federal statutory language so provides; (2) where federal law has so thoroughly occupied a legislative field as to create a reasonable inference that there is no room for the state to supplement it; or (3) where a state law conflicts with a federal law." *Rosado v. DaimlerChrysler Financial Services Trust*, 112 So.3d 1165 (Fla. 2013).

### The Bill's Strict Scrutiny Provisions

Additionally, the bill creates s. 776.00111, F.S., and amends s. 790.25(4), F.S., to require the judiciary to employ strict scrutiny in reviewing any statute that implicates the right to bear arms or defend one's self. In directing the judiciary to employ a certain standard of review, issues might be raised under the Separation of Powers Doctrine set forth in Article II, Section 3 of the Florida Constitution,<sup>79</sup> which prohibits any branch of state government from encroaching upon the powers of another,<sup>80</sup> because the judicial branch is responsible for interpreting and determining the constitutionality of statutes.<sup>81</sup>

There is precedent in Florida Statute for a similar legislative prescription of strict scrutiny review. Section 761.03, F.S. (emphasis added), of the Florida Religious Freedom Restoration Act (FRFRA) of 1998, states:

(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, *except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:*

(a) *Is in furtherance of a compelling governmental interest; and*

(b) *Is the least restrictive means of furthering that compelling governmental interest.*

(2) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.

There is no case law considering the constitutionality of this statute.

### V. Fiscal Impact Statement:

#### A. Tax/Fee Issues:

None.

#### B. Private Sector Impact:

The fines and damages and attorney fee and cost awards under s. 790.053(4), F.S., could result in a private sector fiscal impact if applicable to private persons or entities.

#### C. Government Sector Impact:

The fines and damages and attorney fee and cost awards under s. 790.053(4), F.S., could result in a fiscal impact for violations by local government entities.

<sup>79</sup> Holly Martin, *Legislating Judicial Review: An Infringement on Separation of Powers*, 17 N.Y.U.J. Legis. & Pub. Pol'y 1097, 1115 (2014).

<sup>80</sup> *Chiles v. Children A,B,C,D,E, and F*, 589 So. 260, 263-264 (Fla. 1991).

<sup>81</sup> *Chiles v. Phelps v. Webster*, 714 So.2d 453, 456 (Fla. 1998).

**VI. Technical Deficiencies:**

In s. 790.053(4), F.S., the bill requires, through a cross-reference to s. 790.33(3)(c)-(f), F.S., that *any* persons or entities who infringe on specified rights to bear arms and defend one's self be held liable for civil fines, subject to termination from government employment, and liable for actual damages and attorney fees and costs. Section 790.33, F.S., however, addresses violations by government entities and officials of the Legislature's preemption of the field of firearms and ammunitions. Due to the differences in the types of violations created by the bill in s. 790.053(4), F.S., and in existing law in s. 790.33, F.S., there may not be sufficient guidance in the bill for implementation of the cited penalty scheme in s. 790.033(3), F.S., for violations of s. 790.053(4), F.S., and to whom the penalties apply.

Throughout the bill, references are made to "the right to bear arms *or* defend one's self," the "right to bear arms" without reference to self defense, and the "right to bear arms *and* defend one's self." For consistency in interpretation, it may be desirable to amend the bill to use the same phrase throughout.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 790.02, 790.053, 790.25.

This bill creates section 776.00111 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.