



Office of Commissioner Kenneth T. Welch

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**MEMORANDUM**

**TO:** Commissioner John Morroni, Chairman  
**FROM:** Kenneth T. Welch, Pinellas County Commission  
**SUBJECT:** HB147 & Open Carry Legislation  
**DATE:** November 9, 2015  
**DISTRIB:** Members of the Pinellas Board of County Commissioners  
Mark Woodard, County Administrator

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I plan to discuss "HB147" and "open carry legislation" tomorrow during the County Commissioner comments. Refer to the attached documents.

Item # 55  
15-606

1                                   A bill to be entitled  
 2           An act relating to expunging and sealing criminal  
 3           history records of minors; amending s. 943.0515, F.S.;  
 4           providing for the nonjudicial expunction of the  
 5           criminal history of an offense after a specified  
 6           period for a minor who is not a serious or habitual  
 7           juvenile offender; providing an exception for  
 8           specified minors to apply for expunction before  
 9           attaining 21 years of age; amending s. 943.0582, F.S.;  
 10          eliminating a deadline for submission of an  
 11          application by a minor for a prearrest or postarrest  
 12          diversion expunction; amending s. 790.23, F.S.;  
 13          conforming provisions to changes made by the act;  
 14          providing an effective date.

15  
 16 Be It Enacted by the Legislature of the State of Florida:

17  
 18           Section 1. Paragraph (b) of subsection (1) of section  
 19           943.0515, Florida Statutes, is amended to read:

20           943.0515 Retention of criminal history records of minors.—

21           (1)

22           (b) 1. If the minor is not classified as a serious or  
 23           habitual juvenile offender or committed to a juvenile  
 24           correctional facility or juvenile prison under chapter 985, the  
 25           program shall retain the minor's criminal history record for 2 ~~5~~  
 26           years after the date the minor reaches 19 years of age, at which

27 time the record shall be expunged unless it meets the criteria  
 28 of paragraph (2) (a) or paragraph (2) (b).

29 2. A minor described in subparagraph 1. may apply to the  
 30 department to have his or her criminal history record expunged  
 31 before the minor reaches 21 years of age. To be eligible for  
 32 expunction under this subparagraph, the minor must be 18 years  
 33 of age or older but less than 21 years of age and have not been  
 34 charged by the state attorney with or found to have committed a  
 35 criminal offense within the 5-year period before the application  
 36 date. The only offenses eligible for expunction under this  
 37 subparagraph are those that the minor committed before reaching  
 38 18 years of age. Expunction of a criminal history record under  
 39 this subparagraph requires the approval of the state attorney  
 40 for each circuit in which an offense specified in the criminal  
 41 history record occurred.

42 Section 2. Subsections (3) and (4) of section 943.0582,  
 43 Florida Statutes, are amended to read:

44 943.0582 Prearrest, postarrest, or teen court diversion  
 45 program expunction.—

46 (3) The department shall expunge the nonjudicial arrest  
 47 record of a minor who has successfully completed a prearrest or  
 48 postarrest diversion program if that minor:

49 (a) Submits an application for prearrest or postarrest  
 50 diversion expunction, on a form prescribed by the department,  
 51 signed by the minor's parent or legal guardian, or by the minor  
 52 if he or she has reached the age of majority at the time of

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53 applying.

54 ~~(b) Submits the application for prearrest or postarrest~~  
55 ~~diversion expunction no later than 12 months after completion of~~  
56 ~~the diversion program.~~

57 (b) ~~(e)~~ Submits to the department, with the application, an  
58 official written statement from the state attorney for the  
59 county in which the arrest occurred certifying that he or she  
60 has successfully completed that county's prearrest or postarrest  
61 diversion program, that his or her participation in the program  
62 was based on an arrest for a nonviolent misdemeanor, and that he  
63 or she has not otherwise been charged by the state attorney with  
64 or found to have committed any criminal offense or comparable  
65 ordinance violation.

66 (c) ~~(d)~~ Participated in a prearrest or postarrest diversion  
67 program that expressly authorizes or permits such expunction to  
68 occur.

69 (d) ~~(e)~~ Participated in a prearrest or postarrest diversion  
70 program based on an arrest for a nonviolent misdemeanor that  
71 would not qualify as an act of domestic violence as that term is  
72 defined in s. 741.28.

73 (e) ~~(f)~~ Has never, prior to filing the application for  
74 expunction, been charged by the state attorney with or been  
75 found to have committed any criminal offense or comparable  
76 ordinance violation.

77 (4) The department may ~~is authorized to~~ charge a \$75  
78 processing fee for each request received for prearrest or

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79 postarrest diversion program expunction, for placement in the  
 80 Department of Law Enforcement Operating Trust Fund, unless such  
 81 fee is waived by the executive director.

82 Section 3. Subsection (2) of section 790.23, Florida  
 83 Statutes, is amended to read:

84 790.23 Felons and delinquents; possession of firearms,  
 85 ammunition, or electric weapons or devices unlawful.—

86 (2) This section does ~~shall~~ not apply to a person:

87 (a) Convicted of a felony whose civil rights and firearm  
 88 authority have been restored.

89 (b) Whose criminal history record has been expunged  
 90 pursuant to s. 943.0515(1)(b).

91 Section 4. This act shall take effect July 1, 2016.



## **Broad Support for Reforming Florida's Expunction Laws**

Numerous organizations and individuals support **HB 147** sponsored by Rep. Chris Latvala (R-Clearwater) and Rep. Chris Sprowls (R-Palm Harbor) and **SB 386** sponsored by Nancy Detert (R-Venice) to give kids a second chance at becoming productive citizens:

The Children's Campaign

James Madison Institute

Southern Poverty Law Center

Florida Juvenile Justice Association

Florida Guardian ad Litem

Juvenile Law Center

Florida Public Defenders

PACE Center for Girls

Florida's Children First

Florida Youth SHINE

Florida State University Project on Accountable Justice

Florida Smart Justice Alliance

Florida Coalition for Children

Dr. Charles Kenney

Debra Bradac

The Children's Trust

Voices for Florida

Florida Center for Fiscal and Economic Policy

**Learn more: [iamforkids.org/takeaction](http://iamforkids.org/takeaction)**

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 163 Weapons and Firearms  
**SPONSOR(S):** Criminal Justice Subcommittee; Gaetz and others  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 300

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	8 Y, 4 N, As CS	White	White
2) Justice Appropriations Subcommittee			
3) Judiciary Committee			

### SUMMARY ANALYSIS

Currently, Florida law generally prohibits the open carrying of firearms and certain weapons. Under s. 790.053, F.S., it is a second degree misdemeanor for a person to openly carry on or about his or her person any firearm or electric weapon or device. The bill amends this provision to authorize concealed carry licensees to openly carry firearms or weapons.

Section 790.02, F.S., currently authorizes an officer 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 amends this provision to clarify that it only applies to the unlicensed carrying of a concealed weapon and to delete authorization for such warrantless arrests based on reasonable grounds.

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. The bill also specifies that the right to bear arms or 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 also creates s. 790.0015, F.S., to specify that it is a violation subject to liability for any person or entity to infringe on certain rights to bear arms or defend one's self. With respect to this liability, the bill states, "Notwithstanding any other law, no immunity shall apply to persons or entities infringing on such rights in violation of this section."

Finally, the bill amends s. 790.25(1), 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.

The bill may have an indeterminate fiscal impact on state and local governments and the private sector. Please see "FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT," *infra*.

The bill takes effect upon becoming a law.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Right to Bear Arms for Self-Defense, State Regulation, and Judicial Review

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>1</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>2</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>3</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>4</sup>

Regulations 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 regulations 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 regulations 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 regulations that do not "destroy the core right of self-defense enshrined in the Second Amendment."<sup>5</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," whereas "strict scrutiny 'requires the Government to prove that [a challenged law] 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"<sup>6</sup>

Under the intermediate scrutiny standard, the 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>7</sup>

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>8</sup>

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<sup>1</sup> U.S. Const. Amend. II.

<sup>2</sup> *Dist. of Columbia v. Heller (Heller I)*, 554 U.S. 570, 592 (2008).

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

<sup>4</sup> *Rinzler v. Carson*, 262 So.2d 661, 665 (Fla. 1972).

<sup>5</sup> *Norman*, 159 So.3d at 220-222.

<sup>6</sup> *Id.* at 220.

<sup>7</sup> *Id.* at 222-224.

<sup>8</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. 4<sup>th</sup> Cir. 2014). In other cases, both the lower courts and appellate courts rejected arguments that certain gun regulation statutes are unconstitutional under strict scrutiny.



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.
- 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.

#### Florida's Regulations 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>15</sup> without a license if the individual is not statutorily prohibited from possessing a firearm or weapon<sup>16</sup> and such possession and use occurs in a lawful manner and location.<sup>17</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>18</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>19</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>20, 21</sup>

*Concealed Carry:* In order to lawfully carry a concealed weapon or concealed firearm,<sup>22</sup> a person, unless exempted, must obtain a license from the Department of Agriculture and Consumer Services.<sup>23</sup> If a person is unlicensed, s. 790.01, F.S., specifies that it is a:

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

<sup>15</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>16</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>17</sup> *See* s. 790.25, F.S.

<sup>18</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>19</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>20</sup> s. 790.053(1), F.S.

<sup>21</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.

<sup>22</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>23</sup> s. 790.06, F.S.

<sup>24</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>25</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>26</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>27</sup> S. 790.01(1), F.S.

- Article 1, section 23 of the Missouri Constitution (emphasis added), now provides after the amendment approved August 5, 2014, “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 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>9</sup>
- Article I, section 26(a) of the Alabama Constitution, now provides after the amendment approved November 4, 2014, “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>10</sup>

#### Legislative Preemption of Firearm Regulation

In s. 790.33(1), F.S., the Florida Legislature has preempted “the whole field of regulation of firearms<sup>11</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>12, 13</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>14</sup>

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review. *See, e.g., State v. Zeno*, 155 So.3d 4 (La.App. 1<sup>st</sup> Cir. 2014); and *State in Interest of D.V.*, 144 So.3d 1097 (La.App. 4<sup>th</sup> Cir. 2014).

<sup>9</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>10</sup> There does not appear to be any case law in Alabama discussing the 2014 constitutional amendment.

<sup>11</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>12</sup> s. 790.33(1), F.S.

<sup>13</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>14</sup> s. 790.33(3), F.S.

- A third degree felony<sup>28</sup> to carry a concealed firearm.<sup>29, 30</sup>

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>31</sup>
  - A nonlethal stun gun or dart-firing stun gun<sup>32</sup> or other nonlethal electric weapon or device that is designed solely for defensive purposes.<sup>33</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>34</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 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>35</sup>

<sup>28</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>29</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>30</sup> s. 790.01(2), F.S.

<sup>31</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>32</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>33</sup> s. 790.01(3), F.S.

<sup>34</sup> s. 790.02, F.S.

*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 chapter 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 chapter 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 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.
- A person possessing arms at 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>36</sup>

### Other State Open Carry Laws

*States that Generally Permit Open Carry of Firearms:*<sup>37</sup> Forty-three states permit the open carrying of both long guns and handguns.<sup>38</sup> Of these states, 26 do not require a license and do not restrict whether

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<sup>35</sup> s. 790.06(12)(d), F.S.

<sup>36</sup> s. 790.25(3), F.S.

<sup>37</sup> "Firearms" refers to both handguns and long guns.

<sup>38</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,

the firearm is loaded or unloaded.<sup>39, 40</sup> Connecticut,<sup>41</sup> Georgia,<sup>42</sup> Maryland,<sup>43</sup> New Hampshire,<sup>44</sup> Rhode Island,<sup>45</sup> and Tennessee<sup>46</sup> require a license to openly carry a handgun, but not a long gun, such as a rifle or shotgun. Conversely, Massachusetts,<sup>47</sup> Minnesota,<sup>48</sup> New Jersey,<sup>49</sup> Texas,<sup>50</sup> and Utah<sup>51</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>52</sup> For example, North Dakota limits the hours during which an unlicensed person may openly carry an unloaded handgun.<sup>53</sup>

Three states permit openly carrying specific types of firearms. South Carolina<sup>54</sup> permits openly carrying a long gun without a license, while prohibiting openly carrying a handgun in any circumstance. Hawaii<sup>55</sup> permits openly carrying a handgun with a license and prohibits openly carrying a long gun in any circumstance. Oklahoma<sup>56</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>57</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>58</sup>

*States that Prohibit Open Carry:* The District of Columbia,<sup>59</sup> Florida,<sup>60</sup> Illinois,<sup>61</sup> and New York,<sup>62</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>63</sup>

### Effect of Bill

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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>39</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>40</sup> The status of Arkansas law is based on Attorney General Opinion No. 2015-064 issued August 28, 2015.

<sup>41</sup> CONN. GEN. STAT. §29-35.

<sup>42</sup> GA. CODE ANN. §§16-11-126 and 129(a).

<sup>43</sup> MD. CODE ANN. CRIM. LAW §4-203.

<sup>44</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>45</sup> R.I. GEN. LAWS ANN. §11-47-18.

<sup>46</sup> A license is only required if openly carrying a *loaded* handgun. TENN. CODE ANN. §§39-17-1308 and 1351.

<sup>47</sup> MASS. GEN. LAWS ch. 140 §131.

<sup>48</sup> MINN. STAT. ANN. §§624.714 and 7181.

<sup>49</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>50</sup> TEX. PENAL CODE ANN. §46.02 and 46.15(b).

<sup>51</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>52</sup> Indiana, Iowa, Missouri, Ohio, Oregon, and Pennsylvania

<sup>53</sup> N.D. CENT CODE ANN. §62.1-03-01.

<sup>54</sup> S.C. CODE ANN. §16-23-20.

<sup>55</sup> HAW. REV. STAT. §§134-9 and 134-25.

<sup>56</sup> OKLA. STAT. ANN. tit. 21, §§1290.5 and 1289.6.

<sup>57</sup> TEX. PENAL CODE ANN. §46.02(a-1) (effective January 1, 2016).

<sup>58</sup> OKLA. STAT. ANN. tit. 21, §§1290.2 and 1290.8.

<sup>59</sup> D.C. CODE §22-4504.01.

<sup>60</sup> s. 790.053, F.S.

<sup>61</sup> ILL. COMP. STAT. 5/24-1(a)(4).

<sup>62</sup> N.Y. PENAL §265.01.

<sup>63</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.

The bill creates s. 776.00111, 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 pursuant to ch. 776, F.S. The new section of law further states that the right to bear arms or 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 italicized language is similar to verbiage used by Florida courts when describing the requirements of strict scrutiny review.<sup>64</sup>

The bill creates s. 790.0015, F.S., which specifies, "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 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)." As discussed *supra*, s. 790.33(3)(c) through (f), F.S., provide for:

- A civil fine of up to \$5,000 for a local government official or administrative agency head under whose jurisdiction a knowing and willful violation of legislative preemption has occurred. Additionally, such 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 to be 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.

With respect to the aforementioned liability, the bill states, "Notwithstanding any other law, no immunity shall apply to persons or entities infringing on such rights in violation of this section."

The bill amends s. 790.02, F.S., which authorizes an officer 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, to:

- Clarify that its provisions apply to the *unlicensed* carrying of a concealed weapon.
- Delete authorization for such warrantless arrests based on reasonable grounds. Thus, warrantless arrests may only be based upon probable cause.

The bill amends s. 790.053(1), F.S., which currently prohibits any person, unless exempted, to openly carry firearms and electronic weapons or devices, to authorize concealed carry licensees to openly carry firearms or weapons.

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 chapter 776.
- Specify that the right to bear arms or 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.

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<sup>64</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).

**B. SECTION DIRECTORY:**

Section 1. Creates s. 776.00111, F.S., relating to construction of statutes that implicate the right to bear arms or defend one's self.

Section 2. Creates s. 790.0015, F.S., relating to the infringement of rights and penalties for such infringement.

Section 3. Amends s. 790.02, F.S., relating to warrantless arrests for concealed weapon carry violations.

Section 4. Amends s. 790.053, F.S., relating to the open carrying of weapons.

Section 5. Amends s. 790.25, F.S., relating to lawful ownership, possession, and use of firearms and other weapons.

Section 6. Provides that the bill is effective upon becoming a law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

The bill does not appear to have any impact on state revenues.

**2. Expenditures:**

If litigation is generated by the bill's requirement that the judiciary employ strict scrutiny in reviewing statutes that implicate the right to bear arms or defend one's self, there will be an indeterminate fiscal impact for litigation costs.

The fines and damages and attorney fee and cost awards under s. 790.0015, F.S., could result in a fiscal impact for violations by state government entities.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

The bill does not appear to have any impact on local government revenues.

**2. Expenditures:**

The bill limits application of the second degree misdemeanor penalty for the open carrying of firearms and electronic devices to persons who are not licensed to concealed carry. As such, the bill may result in a negative jail bed impact (i.e., may decrease the need for jail beds).

The fines and damages and attorney fee and cost awards under s. 790.0015, F.S., could result in a fiscal impact for violations by local government entities.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The fines and damages and attorney fee and cost awards under s. 790.0015, F.S., could result in a private sector fiscal impact if applicable to private persons or entities.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

*Strict Scrutiny:* 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>65</sup> which prohibits any branch of state government from encroaching upon the powers of another,<sup>66</sup> because the judicial branch is responsible for interpreting and determining the constitutionality of statutes.<sup>67</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.

*Immunity Waiver:* In s. 790.0015, F.S., the bill appears to impose liability on a person or entity who, without probable cause to believe a crime has been committed, infringes on an individual's rights to bear arms or defend one's self. The bill further states that, "Notwithstanding any other law, no immunity shall apply to persons or entities infringing on such rights in violation of this section." The term "law" is not defined. According to Black's Law Dictionary (10<sup>th</sup> ed. 2014), the term "law" means "[t]he aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action; esp., the body of rules, standards, and principles that the courts of a particular jurisdiction apply in deciding controversies brought before them ...."

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.

<sup>65</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>66</sup> *Chiles v. Children A,B,C,D,E, and F*, 589 So. 260, 263-264 (Fla. 1991).

<sup>67</sup> *Chiles v. Phelps v. Webster*, 714 So.2d 453, 456 (Fla. 1998).



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>68</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>69</sup>

Due to bill’s general waiver of immunity, it is difficult to determine all of the precise immunities that may be waived. 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>70</sup> Additionally, 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>71</sup>

#### B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

Article I, section 8(a) of the Florida Constitution (emphasis added), in relevant part, 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 ....” Throughout the bill, references are made to “the right to *bear arms or defend one’s self*.”

In s. 790.0015, F.S., the bill requires, through a cross-reference to s. 790.33(3)(c)-(f), F.S., that persons or entities who infringe on specified rights to bear arms or 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. 790.0015, 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. 790.0015, F.S., particularly in cases involving violations by private persons or entities.

In s. 790.25(4), F.S., the bill refers to “this act.” For clarity, it may be desirable to amend the bill to specifically cite the chapter, section, or portion of a section to which it is referring.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On October 6, 2015, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment created a new s. 790.0015, F.S., in Section 2. of the bill so that the bill’s prohibition against persons or entities infringing on specified rights to bear arms or defend one’s self would be set forth in a stand-alone section of law. The amendment also revised terminology in order to use the phrase “right to bear arms or defend one’s self” consistently throughout the bill.

This bill analysis is drafted to the committee substitute adopted by the Criminal Justice Subcommittee.

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<sup>68</sup> *Office of State Attorney, Fourth Judicial Circuit of Florida v. Parrotino*, 628 So.2d 1097, 1098-1099 (Fla. 1993).

<sup>69</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).

<sup>70</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>71</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 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: CS/SB 300

INTRODUCER: Criminal Justice Committee and Senator Gaetz

SUBJECT: Weapons and Firearms

DATE: October 20, 2015

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

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Cellon	Cannon	CJ	Fav/CS
2.	_____	_____	JU	_____
3.	_____	_____	RC	_____

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

**I. Summary:**

CS/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, subject to the provisions in ss. 790.06 and 790.10, F.S. Section 790.06, F.S., is the concealed weapons and firearms licensing statute; s. 790.10, F.S., prohibits a person from exhibiting a firearm or weapon in the presence of another person in a rude, careless, angry, or threatening manner, not in necessary self defense.

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>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).

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.

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,

<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.

<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.

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>

### **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>

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

<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).

- 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 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>

<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.

- A third degree felony<sup>27</sup> to carry a concealed firearm.<sup>28, 29</sup>

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>

Licenses 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.

<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.

<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.

- 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 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

<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.

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 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>

<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.



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> 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>

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<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.

<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.

### ***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>

### **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.

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<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.

<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.

- 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.
- 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

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

<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).

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.

Persons openly carrying firearms or weapons are required to do so subject to the provisions of s. 790.06 and s. 790.10, F.S. This clarifies two things:

- That the application of the concealed carry licensing statute, s. 790.06, F.S., to a person who chooses to openly carry, is not changed by the bill; and
- A person who is authorized to openly carry under the bill is not exempted from the prohibition in s. 790.10, F.S., against exhibiting a firearm or weapon in the presence of another person in a rude, careless, angry, or threatening manner, not in necessary self defense.

### 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* 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*.

<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.

### **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>

### **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.

<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).

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>

**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.*

<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).

<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).

(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.

**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, and 790.25.

This bill creates section 776.00111 of the Florida Statutes.

**IX. Additional Information:**

**A. Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Criminal Justice on October 20, 2015:**

- Clarifies that the application of the concealed carry licensing statute, s. 790.06, F.S., to a person who chooses to openly carry, is not changed by the bill; and
- Clarifies a person who is authorized to openly carry under the bill is not exempted from the prohibition in s. 790.10, F.S., against exhibiting a firearm or weapon in the presence of another person in a rude, careless, angry, or threatening manner, not in necessary self defense.

**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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