IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

FLORIDA CARRY, INC., and
ALEXANDRIA LAINEZ,

Appellants,

v.

UNIVERSITY OF NORTH FLORIDA,
JOHN DELANEY,

Appellees.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-2174

Opinion filed December 10, 2013.

An appeal from the Circuit Court for Duval County.
L. P. Haddock, Judge.

Eric J. Friday, Lyman T. Fletcher, and Michael R. Phillips of Fletcher & Phillips, Jacksonville, for Appellants.

Paul R. Regensdorf, George E. Schulz, Jr., and Ben Z. Williamson of Holland & Knight, LLP, Jacksonville, for Appellees.

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ROBERTS, J.

The appellants, Florida Carry, Inc., and Alexandria Lainez, appeal a final order denying their motion for temporary injunction and a final order granting the motion to dismiss of the appellees, University of North Florida (UNF) and John

Delaney. At issue in this case is whether a state university may prohibit the carrying of a securely encased firearm within a motor vehicle that is parked in a university campus parking lot. We hold that the legislature has not delegated its authority under the Florida Constitution to regulate the manner of bearing arms to the state universities and reverse the orders on appeal.

Facts and Procedural History

Section 14.0080P of the policies and regulations adopted by UNF bans the storage of any "weapon or destructive device," as defined by section 790.001, Florida Statutes (2011), in a vehicle located on UNF property. Section 790.001(6), Florida Statutes (2011), includes firearms in the definition of "weapon or destructive device." As provided in Section 5.0010R(J) of the Student Conduct Code, UNF may impose sanctions, including suspension and expulsion, upon a student who violates the regulation. In addition, section 5.0010R(J) specifically authorizes a referral to law enforcement for criminal prosecution stating that a student, resident, or commuter found in violation of the regulation "will be subject to arrest and/or discipline in accordance with Florida State Statute and the Student Conduct Code."

The facts of this case are undisputed. Lainez, a student enrolled at UNF, and Florida Carry, Inc., an organization of gun owners of which Lainez is a member, filed a lawsuit to challenge UNF's regulation. The complaint alleged that Lainez

desires to carry a firearm while traveling to and from school as a lawful method of self-defense and that she wishes to store the firearm in her vehicle while on campus. The complaint argued that UNF had no authority to adopt the regulation in question because the Florida legislature had expressly preempted the entire field of firearms regulation in section 790.33(1), Florida Statutes (2011). The complaint sought an award of damages or, in the alternative, a statutory fine, a declaration that UNF's regulation was invalid, and an injunction prohibiting the enforcement of the regulation. The appellants also sought a temporary injunction during the pendency of the case to prevent the enforcement of any UNF rules or regulations regarding the otherwise lawful possession of a weapon or firearm in a vehicle and to prevent the punishment of any student for the same.

The appellees moved to dismiss the complaint, arguing that UNF was authorized to regulate firearms possession and storage on school property in accordance with section 790.115, Florida Statutes (2011). UNF maintained that the regulation was authorized under section 790.115(2)(a)3., Florida Statutes (2011), which provides that firearms may not be possessed on school property except when securely encased in a vehicle, but that "school districts" may adopt policies to waive the secure encasement exception. The appellants countered that UNF was not a "school district;" therefore, it was not authorized to waive the exception and prohibit firearms in vehicles on its campus.

After hearings on the motions, the trial court denied the appellants' motion for temporary injunction and granted the appellees' motion to dismiss. The trial court reasoned that applying the appellants' definition of "school district" to section 790.115 would permit only public schools to regulate firearms on their property and frustrate the clearly expressed intent of the legislature to cover all schools as the term "school" was broadly defined in section 790.115(2)(a).

On appeal, the appellants argue: (1) that the legislature clearly intended to preempt regulation of firearms by any other agency or subdivision of the state; (2) that the legislature has determined it is lawful to carry a weapon or firearm securely encased in a vehicle and that right should be liberally construed; and (3) that the legislature has not granted any affirmative authority to UNF to waive the secure encasement provision in section 790.115(2)(a)3. We agree with the appellants' arguments.

Prior to oral argument, this court, through the three-judge panel, ordered the parties to be prepared to address the following questions:

> 1. Does a state university have independent authority under Article IX, section 7 of the Florida Constitution as interpreted in [Graham v. Haridopolos, 108 So. 3d 597 (Fla. 2013),] and NAACP, Inc. v. Florida Board of Regents, 876 So. 2d 636 (Fla. 1st DCA 2004), to adopt a noncriminal policy or regulation concerning the possession of firearms on campus, irrespective of any right it may have under section 790.115(2)(a)3., Florida Statutes, to waive the exception that would allow a student to possess a firearm in a vehicle?
>
> 2. Does the University of North Florida qualify as a "local or state

> government" such that its policies and regulations could be preempted by section 790.33, Florida Statutes?
>
> 3. Does the provision of the student handbook at issue in this case qualify as an "ordinance," "rule," or "administrative regulation" within the meaning of section 790.33, Florida Statutes?

The panel then requested supplemental briefing from the parties on the questions above.

Analysis

I. Section 790.115, Florida Statutes

We first emphasize that the only legal question presented, argued, and decided by the trial court was whether section 790.115 allowed UNF to prohibit a student, who was otherwise lawfully able to possess a firearm, from keeping said firearm securely encased in her vehicle in a campus parking lot. In its answer brief before this court, UNF advanced only its views regarding the interpretation of section 790.115.

The legislature has provided that a person shall not possess a firearm on school property unless part of a school-sponsored event. See § 790.115(2)(a), Fla. Stat. (2011). This section defines "school" broadly to encompass preschool and elementary through secondary schools as well as career centers and post-secondary schools, whether public or private. See id. Importantly, the legislature also provided exceptions to this general prohibition. See §§ 790.115(2)(a)1.-3., Fla. Stat. (2011). Namely, that a person may carry a firearm in a vehicle pursuant to

section 790.25(5), Florida Statutes (2011), which provides that a firearm may be kept in a private conveyance as long as it is securely encased. The provisions of section 790.25 authorizing the carrying of securely encased firearms in private conveyances as well as other lawful carrying of firearms "shall be liberally construed to carry out the declaration of policy herein and in favor of the constitutional right to keep and bear arms for lawful purposes." § 790.25(4), Fla. Stat. (2011).

While it provides an exception to the general prohibition, section 790.115(2)(a)3. also contains a waiver provision providing that "school districts may adopt written and published policies that waive the exception in this subparagraph for purposes of student and campus parking privileges." §790.115(2)(a)3., Fla. Stat. (2011). The statute clearly grants *school districts* the power to waive the exception – not colleges or universities. UNF attempted to exercise this waiver in adopting the operative regulation; however, UNF is not a "school district." Section 790.115 only uses the term "school district" once; outside of subsection 790.115(2)(a)3., the statute uses the word "school" alone. UNF, as a public post-secondary school, falls within the definition of a "school" in section 790.115(2)(a), but that does not mean that it also falls within the definition of "school district," a term that is not defined in section 790.115.

Where the legislature has not defined the words used in a statute, the

language should be given its "plain and ordinary meaning." See Sch. Bd. of Palm Beach Cnty. v. Survivors Charter Sch., Inc., 3 So. 3d 1220, 1233 (Fla. 2009) (quoting Fla. Birth-Related Neurological Injury Comp. Ass'n v. Fla. Div. of Admin. Hearings, 686 So. 2d 1349, 1354 (Fla. 1997)). The appellees contend that the legislature intended "school districts" to be interpreted broadly to include a state university board of trustees. Such a construction is contrary to the plain and ordinary meaning of "school district" as it is used in the Florida Constitution and statutes.

Article IX, section 4, of the Florida Constitution provides:

> (a) Each county shall constitute a school district. . . . In each school district there shall be a school board composed of five or more members chosen by vote of the electors in a nonpartisan election for appropriately staggered terms of four years, as provided by law.
>
> (b) The school board shall operate, control and supervise all free public schools within the school district and determine the rate of school district taxes within the limits prescribed herein. . . .

Florida's K-20 Education Code, Chapters 1000-1013, Florida Statutes (2011), sets forth the governing structure of Florida's various educational entities. Significantly here, School District Governance (Chapter 1001, Part II, Florida Statutes (2011)) is separate, by statute, from State Universities (Chapter 1001, Part IV, Florida Statutes (2011)). The provisions concerning School District Governance provide that each county constitutes a school district, that the district school system shall include all public schools in that district under the direction of

district school officials, and that the district school board "shall operate, control, and supervise all free public schools in their respective district." See §§ 1001.31-1001.33, Fla. Stat. (2011). In contrast, the state university system is organized and governed differently than the public district school system. The state university system is operated and regulated by the state board of governors, and each university within the system is operated by a board of trustees under the powers and duties granted by the board of governors. See Art IX, sec. 7(c)-(d), Fla. Const.; Ch. 1001, Part IV, Fla. Stat. (2011). Thus, by law, "school districts" are distinct legal entities that do not operate and control state universities.

Also significant here, the term "school district" is only used in subsection 790.115(2)(a)3. while the rest of section 790.115 simply uses the term "school." Where the legislature includes wording in one section of a statute and not in another, it is presumed to have been intentionally excluded. See Bd. of Trs. of Fla. State Univ. v. Esposito, 991 So. 2d 924, 926 (Fla. 1st DCA 2008) (quoting L.K. v. Dep't of Juvenile Justice, 917 So. 2d 919, 921 (Fla. 1st DCA 2005)). The judiciary cannot extend the terms of an unambiguous statute beyond its express terms or reasonable and obvious implications under Florida's strict separation of powers delineated in article II, section three, of the Florida Constitution. See Davila v. State, 75 So. 3d 192, 196 (Fla. 2011). Even when the court determines the legislature intended something not expressed in the wording, the judiciary lacks the

authority under organic law to depart from the plain meaning of an unambiguous statute. See Johnson v. Gulf Cnty., 26 So. 3d 33, 41 (Fla. 1st DCA 2009) (quoting Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992)). Thus here, it must be presumed that the legislature intended to grant the power to issue waivers solely to "school districts" not individual "schools."

This court is almost in full agreement that UNF does not qualify as a "school district" under section 790.115; therefore, UNF does not have the authority to waive itself out of the requirements of section 790.25, which gives Lainez the right to carry a securely encased firearm in her vehicle. Where we differ is in our consideration of the constitutional issue raised by the original panel.

II. The Dissent

The dissent implicitly concedes that statutory interpretation of section 790.115 would require reversal. However, the dissent bypasses any error in the trial court's legal analysis of section 790.115(2)(a)3. and suggests affirmance under the authority granted to the UNF Board of Trustees by the board of governors under article IX, section 7. We respectfully disagree. Whatever the scope of authority granted to the universities under article IX, section 7, it does not encompass a university regulation that prohibits the carrying of a securely encased firearm within a vehicle parked in a university parking lot.

Section 790.33, Florida Statutes

The legislature's primacy in firearms regulation derives directly from the Florida Constitution. Article I, Section 8(a), of the Florida Constitution provides:

> 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.

The phrase "by law" indicates that the regulation of the state right to keep and bear arms is assigned to the legislature and must be enacted by statute. Cf. Grapeland Heights Civic Ass'n v. City of Miami, 267 So. 2d 321, 324 (Fla. 1972) (considering the enactment clause language of article III, section 6, of the Florida Constitution and interpreting the constitutional term "law" in the phrase "authorized by law" to mean an enactment by the legislature not by a city commission or any other political body). Indeed, the legislature has reserved for itself the whole field of firearms regulation in section 790.33(1), which provides:

> **(1) Preemption.--**Except as expressly provided by the State Constitution or general law, the Legislature hereby declares that it is occupying the whole field of regulation of firearms and ammunition, including the purchase, sale, transfer, taxation, manufacture, ownership, possession, storage, and transportation thereof, to the exclusion of all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules adopted by local or state government relating thereto. Any such existing ordinances, rules, or regulations are hereby declared null and void.

Previously, this statute only explicitly preempted the regulation of firearms by local government. See Pelt v. State, Dept. of Transp., 664 So. 2d 320, 321 (Fla.

1st DCA 1995), *rev. denied*, 671 So. 2d 788 (Fla. 1996). However, in October 2011, the legislature added the phrase "any administrative regulations or rules adopted by local or state government" to emphasize and reiterate that the regulation of firearms was solely within the purview of the legislature and not within the jurisdiction of local governments or agencies of the state government using their rulemaking power. See ch. 2011-109, § 1, Laws of Fla. "It is presumed that in adopting an amendment, the legislature intends to *change* the meaning of a statute unless a contrary intention is clearly expressed." Equity Corp. Holdings, Inc. v. Dep't of Banking & Fin., Div. of Fin., 772 So. 2d 588, 590 (Fla. 1st DCA 2000). As such, we must interpret the statute to preempt the regulation of the right to bear arms from state governmental entities as well as local government. To rule otherwise and permit a state agency to enact rules or policies restricting the right to bear arms without a specific legislative delegation would render the 2011 amendment superfluous.[1]

Evidence of the legislature's intent to preempt the entire field of firearm regulation is located in subsection 790.33(4)(e), which provides that section 790.33(1) does not prohibit the Florida Fish and Wildlife Conservation Commission (FWCC) from regulating the use of firearms as a method of taking

[1] Whether the legislature has the authority to delegate, in part, the exclusive authority to enact regulations regarding the right to keep and bear arms was not argued in this case, and we need not consider it to decide this case.

wildlife and from regulating shooting ranges. Like state universities, the FWCC derives its authority from the Florida Constitution. See Art. IV, § 9, Fla. Const. If, in implementing the exclusive constitutional authority to regulate firearms in section 790.33 the legislature did not intend to preempt such constitutional agencies in the first place, it would have been completely unnecessary to exempt the FWCC, a constitutional agency. In other words, subsection 790.33(4)(e) would be superfluous if the dissent's analysis were correct. It follows logically then that section 790.33 must be read to preempt even those state agencies deriving their authority directly from the Florida Constitution. See Hechtman v. Nations Title Ins. of N.Y., 840 So. 2d 993, 996 (Fla. 2003) ("It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage.").

Like the FWCC, state universities qualify as state agencies. See § 1001.705(1)(d), Fla. Stat. (2011) (defining a state university as an agency of the state that belongs to and is a part of the executive branch of state government). University boards of trustees are also part of the executive branch of state government. See § 1001.71(3), Fla. Stat. (2011). While universities may be excluded from the definition of an agency in regard to particular statutes, section 790.33 contains no such exclusion. Absent this specific exclusion in the statute at

hand, universities must qualify as part of "state government." The regulation adopted by UNF in this case qualifies as an administrative rule "adopted by local or state government," which the legislature has expressly preempted. See § 790.33(1), Fla. Stat. (2011).

Article IX, Section 7

The dissent suggests affirmance under the tipsy coachman doctrine and posits that state universities have the independent authority under article IX, section 7, to implement the regulation at issue even in the face of a statutory provision that provides otherwise. The dissent interprets the scope of the university's authority broadly enough to encompass the regulation at issue, which it characterizes as merely regulating the conduct of students exercising the privilege to enroll in UNF. Interpreting the board of governors' authority in article IX, section 7, so broadly in this instance conflicts with the right to keep and bear arms in article I, section 8(a). Thus, we must interpret the scope of authority in article IX, section 7, in a manner that gives effect to both provisions. See Askew v. Game & Fresh Water Fish Comm'n, 336 So. 2d 556, 560 (Fla. 1976) (recognizing that constitutional provisions should be considered in light of the Constitution as a whole, thus favoring an interpretation that gives effect to every part).

An inquiry into the scope of the board of governors' authority must first

begin with an examination of the actual language of the constitutional provision. See Caribbean Conservation Corp. v. Fla. Fish & Wildlife Conservation Comm'n, 838 So. 2d 492, 501 (Fla. 2003) (quoting Fla. Soc'y of Ophthalmology v. Fla. Optometric Ass'n, 489 So. 2d 1118, 1119 (Fla. 1986)). This court endeavors to construe constitutional provisions consistent with the intent of the framers and the voters. Id.

In November 2002, the voters approved Amendment 11, which had been proposed by initiative petition. The amendment created article IX, section 7, and established the board of governors of the state university system as a corporate body that "shall operate, regulate, control, and be fully responsible for the management of the whole university system." Art. IX, § 7(d), Fla. Const. The board's responsibilities include, but are not limited to:

> [D]efining the distinctive mission of each constituent university and its articulation with free public schools and community colleges, ensuring the well-planned coordination and operation of the system, and avoiding wasteful duplication of facilities or programs.

Id.

Section 7(d) also provides that the board's "management shall be subject to the powers of the legislature to appropriate for the expenditure of funds, and the board shall account for such expenditures as provided by law." Id.

The scope of the board's authority has been interpreted in various decisions from this court and the supreme court. While these decisions have interpreted the

board's scope of authority broadly, it is notable that the areas at issue all concerned matters directly related to education. See Fla. Pub. Employees Council 79, AFSCME, AFL-CIO v. Pub. Employees Relations Comm'n, 871 So. 2d 270 (Fla. 1st DCA 2004) (personnel); NAACP, Inc. v. Fla. Bd. of Regents, 876 So. 2d 636 (Fla. 1st DCA 2004) (admission criteria); Decker v. Univ. of W. Fla., 85 So. 3d 571 (Fla. 1st DCA 2012) (student discipline sanctions for cheating). Most recently in Graham v. Haridopolos, 75 So. 3d 315 (Fla. 1st DCA 2011), this court determined that the board's authority did not include the power to set and appropriate tuition and fees. That decision was affirmed by the supreme court in Graham v. Haridopolos, 108 So. 3d 597, 604 (Fla. 2013), which recognized that the language of article IX, section 7, did not plainly transfer to the board the legislature's control over tuition and fees, but instead granted the board the responsibility to "operate," "regulate," "control," and "be fully responsible for the management of the whole university system." Employing the canon of construction *esjusdem generis* to construe the meaning of "operate, regulate, control, and be fully responsible for the management of the whole university system," the supreme court reasoned that the listed responsibilities in article IX, section 7, included responsibilities that were "executive and administrative in nature." Id. at 605. The supreme court determined that the ability to set and appropriate for the expenditure of tuition and fees was of a wholly different nature

and, therefore, was not included with the meaning of the authority vested in article IX, section 7(d). Id.

While the Haridopolos decisions were based, in part, on the express language in article IX, section 7(d), the discussion of the board's scope of authority is instructive here. We likewise interpret the board's authority in article IX, section 7, to encompass responsibilities that are "executive and administrative" in nature. See id. Regulating a citizen's right to keep and bear arms is of a wholly different nature. Thus, we respectfully disagree with the dissent's argument that the constitutional language in article IX, section 7, contemplated giving the board (and therefore UNF) plenary authority to enact the regulation at issue, which would deprive students attending UNF of their constitutional right to bear arms as provided by organic law and legislative enactment.

Furthermore, in our view, reading the grant of authority in article IX, section 7, to allow the university to regulate the lawful possession of firearms would have caused this amendment to fail its ballot title and summary review in the supreme court pursuant to section 101.161, Florida Statutes, and article V, section 3(b)(10), of the Florida Constitution. The ballot title and summary to Amendment 11 presented to the voters at the 2002 general election read:

> *Ballot title*: Local trustees and statewide governing board to manage Florida's university system.
>
> *Ballot summary*: A local board of trustees shall administer each state

> university. Each board shall have thirteen members dedicated to excellence in teaching, research, and service to community. A statewide governing board of seventeen members shall be responsible for the coordinated and accountable operation of the whole university system. Wasteful duplication of facilities or programs is to be avoided. Provides procedures for selection and confirmation of board members, including one student and one faculty representative per board.

In re Advisory Op. to the Atty. Gen. ex rel. Local Trs., 819 So. 2d 725, 727-28 (Fla. 2002).

In its review of this ballot title and summary, the supreme court held that the proposed amendment did "not substantially affect or alter any [other] provision in the state constitution." Id. at 732. If a constitutional amendment by initiative seeks to "amend multiple sections of the constitution . . . [it] should identify the articles or sections of the constitution substantially affected." Fine v. Firestone, 448 So. 2d 984, 989 (Fla. 1984). There was nothing in either the text of Amendment 11 or the ballot title or summary to indicate in any way that the amendment to article IX, section 7, would give the board of governors the authority to override the provisions of article I, section 8, providing that the legislature alone has the authority to regulate the manner of bearing arms. Had it done so, the public would have been alerted that Amendment 11 could have diminished the people's fundamental right to bear arms, a right that has been zealously guarded and protected, as noted by Judge Makar in his concurrence. In essence, to adopt the dissent's view we would allow Amendment 11 to "fly under

false colors." See Armstrong v. Harris, 773 So. 2d 7, 16-18 (Fla. 2000).

The dissent maintains that the regulation at issue is a condition on the exercise of a "privilege" rather than a restriction on a fundamental constitutional right. Its analysis thus characterizes the regulation at issue as noncriminal. However, by waiving the secure encasement exception under section 790.115, the regulation here purports to subject a person with a firearm securely encased in his or her vehicle to a potential third-degree felony charge for a violation. See § 790.115(2)(c)1., Fla. Stat. (2011).

The dissent also argues that the university has the power to regulate otherwise lawful activities in the context of student conduct, i.e., consuming alcohol in a classroom or smoking in a dorm room. While true in certain contexts, restricting recreational activities is a far cry from restricting a fundamental, constitutional right to keep and bear arms for self-defense. We recognize that section 1001.706(7)(b), Florida Statutes (2011), gives the board of governors the authority to restrict the use of firearms, food, tobacco, and alcoholic beverages, among other things. However, this provision must be read *in pari materia* with section 790.115. If the issue in this case involved the right of a student to carry a firearm in the classroom or at a sporting event, our analysis would be different. There are certain places where firearms can be legally prohibited, but the legislature has recognized that a citizen who is going to be in one of these places

should be able to keep a firearm securely encased within his or her vehicle.

In regulating the manner of bearing arms, the legislature has attempted to balance this fundamental right with the safety of Florida citizens. This balance can be seen in the "guns-at-work" statute, section 790.251, Florida Statutes (2011),[2] which provides, in part,

> **(3) Legislative intent; findings.--**This act is intended to codify the long-standing legislative policy of the state that individual citizens have a constitutional right to keep and bear arms, that they have a constitutional right to possess and keep legally owned firearms within their motor vehicles for self-defense and other lawful purposes, and that these rights are not abrogated by virtue of a citizen becoming a customer, employee, or invitee of a business entity. It is the finding of the Legislature that a citizen's lawful possession, transportation, and secure keeping of firearms and ammunition within his or her motor vehicle is essential to the exercise of the fundamental constitutional right to keep and bear arms and the constitutional right of self-defense. The Legislature finds that protecting and preserving these rights is essential to the exercise of freedom and individual responsibility. The Legislature further finds that no citizen can or should be required to waive or abrogate his or her right to possess and securely keep firearms and ammunition locked within his or her motor vehicle by virtue of becoming a customer, employee, or invitee of any employer or business establishment within the state, unless specifically required by state or federal law.

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[2] In Florida Retail Federation v. Attorney General of Florida, 576 F. Supp. 2d 1301, 1302 (N.D. Fla. 2008), the Northern District held section 790.251 unconstitutional in part because the court found it irrationally compelled some businesses, but not others, to allow a customer to secure a gun in a vehicle. However, the opinion recognized that the state may compel a business to allow a gun to be secured in a vehicle in a parking lot and upheld the statute to the extent it compelled a business to allow a worker with a concealed weapons permit to secure a gun in a vehicle in a parking lot. Thus, the legislative intent contained within the statute remains relevant for our purposes here.

Section 790.115 strikes a similar balance when it prohibits firearms from school property except when securely encased within a vehicle pursuant to section 790.25(5).

III. The Concurrences

All of the concurring judges agree with the interpretation of section 790.115 above. Understandably, some of the concurring judges are wary of weighing in on the constitutional issue raised by the dissent. However, a concurrence that does not address the constitutional arguments put forth by the dissent results in an implicit ruling that the authority of the board of governors is not as expansive as the dissent reads it in article IX, section 7.

The procedural posture of this case requires that this court address the constitutional issue. The original panel asked the parties to be prepared to speak on the application of article IX, section 7, in oral argument and then required briefing on the issue. The dissent is entitled to make a "tipsy coachman" argument in order to affirm. If the dissent were correct that article IX, section 7, gives the board of governors independent authority to regulate securely encased firearms within vehicles despite a statute requiring a contrary result, then neither section 1001.706(7)(b), Florida Statutes, nor the provisions of chapter 120 governing how agencies receive their rule-making authority would limit the board of governors and the board of trustees. See In re Advisory Op. of the Governor, 334 So. 2d 561

(Fla. 1976). The board of governors has, after all, delegated the responsibility for "campus safety" to the various boards of trustees.[3] Such a delegation would be a sufficient grant of power to enact the regulation at issue, which clearly relates to campus safety, regardless of whether one believes disarming students actually makes university campuses more or less safe. Furthermore, any argument that UNF's regulation fails because it did not have authority delegated by the board of governors constitutes a "tipsy coachman" reversal – a jurisprudential device unknown in the law. See Advanced Chiropractic & Rehab. Ctr. Corp. v. United Auto. Ins. Co., 103 So. 3d 866, 869 (Fla. 4th DCA 2012) (citing State v. Baez, 894 So. 2d 115, 121 (Fla. 2004) (Pariente, C.J., dissenting)).

IV. Conclusion

In conclusion, the trial court incorrectly construed the meaning of "school district" in section 790.115. While school districts may adopt a waiver disallowing securely encased firearms in vehicles parked on campuses under their authority, neither UNF nor the UNF Board of Trustees qualifies as a school district under section 790.115(2)(a)3. The legislature has preempted UNF from independently regulating firearms. As such, section 14.0080P of the UNF policies and regulations, to the extent it prohibits possession of securely encased firearms in

[3] Board of Governors Regulation 1.001(3)(l) provides that the university boards of trustees are responsible for "campus safety and emergency preparedness, to include safety and security measures for university personnel, students, and campus visitors."

motor vehicles, is illegal and unenforceable. For these reasons, we reverse and remand for disposition consistent with this opinion.

REVERSED and REMANDED.

LEWIS, C.J., WOLF, BENTON, THOMAS, ROWE, SWANSON, and MAKAR, JJ., concur.

BENTON, J., concurs in an opinion in which WOLF, J., joins.

WETHERELL, J., concurs in an opinion in which MARSTILLER, RAY, and OSTERHAUS, JJ., join.

SWANSON, J., concurs with opinion.

MAKAR, J., concurs in an opinion in which OSTERHAUS, J., joins in PART II.

OSTERHAUS, J., concurs in an opinion in which WETHERELL, MARSTILLER, RAY, and MAKAR, JJ., join.

PADOVANO, J., dissents in an opinion in which VAN NORTWICK, and CLARK, JJ., join.

BENTON, J., concurring.

As the majority opinion explains, the University of North Florida is not a "school district" within the meaning of section 790.115(2)(a)3., Florida Statutes (2011). The trial court was in error on this point, and the case has to go back. But section 790.115(2)(a)3. does not control disposition of the entire case, and the court is not saying otherwise today.

Statutory prohibitions against exhibiting a firearm "at a school-sponsored event or on the grounds or facilities of any school" and against possessing a firearm outside a vehicle "on the property of any school" "except as authorized in support of school-sanctioned activities, at a school-sponsored event" also pertain. See § 790.115(1), (2)(a), Fla. Stat. (2011). The University is a "postsecondary school" for purposes of these provisions. See § 790.115(2)(a)3., Fla. Stat. (2011).

Section 790.06(12)(a)9. and 13., Florida Statutes (2011), make clear, moreover, that licenses to carry concealed weapons do not authorize carrying a handgun openly or carrying a concealed firearm into "[a]ny school, college, or professional athletic event not related to firearms" or into "[a]ny 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."

In short, the University successfully advanced its stated purpose to "clarify [its] weapons policy while remaining consistent with Florida law" when it stated in its Policies & Regulations that the University is a school as defined in section 790.115, Florida Statutes; that statutory prohibitions forbid possession of firearms on school property—except as specifically allowed in chapter 790 (e.g., in a vehicle pursuant to section 790.25(5), Florida Statutes, or in the limited circumstances (like ROTC) set forth in sections 790.115 and 790.06)—and that failure to observe the ban may subject offending students to school discipline, not to mention criminal prosecution.

While the Florida Constitution confers on the Legislature the right and responsibility to regulate "the manner of bearing arms," Art. I, § 8(a), Fla. Const., the Legislature may exercise its constitutional prerogative by delegating article I section 8 authority to the Board of Governors or directly to the university boards of trustees, just as it delegated article I section 8 authority to the Fish and Wildlife Conservation Commission by enacting section 790.33(4)(e), Florida Statutes (2011), and to the school districts by enacting section 790.115(2)(a)3., Florida Statutes (2011).

As (among other things) a partial, contingent or potential delegation of article I section 8 authority, section 1001.706(7)(b), Florida Statutes (2011), must, however, be construed in pari materia with section 790.115, Florida Statutes

(2011). No fair reading of section 1001.706(7)(b) provides authority for the anonymous drafters of a student conduct code to set at naught section 790.115 or any other duly enacted statute. There is, indeed, no true "regulation at issue" in the present case, the dissenting opinion notwithstanding.

On remand, the trial court needs to revisit its ruling with regard to the University's policy against lawfully storing securely encased weapons "in their vehicle[s] while on any University property or University-controlled property." But a sweeping declaration that "[a]ll UNF rules and administrative regulations regarding firearms are null and void," as demanded in the first amended complaint, is plainly unwarranted.

WETHERELL, J., specially concurring.

I agree with the analysis in Part I of the majority opinion and the disposition in Part IV of the opinion, but I do not join the remainder of the opinion for the reasons stated in Judge Osterhaus' opinion with which I fully concur. I write separately to elaborate on why the constitutional issue injected into this case by the original panel, embraced by the dissent, and rejected on the merits by the majority is not implicated in this case.

The dissent asserts that "universities" have the power pursuant to article IX, section 7 of the Florida Constitution to adopt policies and regulations that trump conflicting state laws. The majority rejects this argument and holds that article IX, section 7 does not give the universities such power, at least in the context of firearm regulation. The problem with the dissent's argument (and the majority's decision to address the argument in this case) is that it glosses over the governance hierarchy of the state university system and ascribes the constitutional authority of the Board of Governors (BOG) to an individual state university without any indication that the BOG delegated its purported law-trumping power to the university.

The BOG is a constitutionally-created executive branch agency and is responsible for managing "the whole university system." Art. IX, § 7(d), Fla. Const.; see also § 1001.705(2), Fla. Stat.[4] Each of the twelve individual state

universities is "administered" by a board of trustees (BOT) that is responsible for providing policy-direction, oversight, and strategic planning for the university. See Art. IX, § 7(c), Fla. Const.; BOG Reg. 1.001. The BOG and the BOTs are not responsible for the day-to-day operation of the individual universities; that is the responsibility of the university's administration under the direction and control of the university president.

Article IX, section 7 does not grant any constitutional authority to the individual universities. Section 7(d) vests the BOG with the authority to "operate, regulate, control, and [manage]" the university system, and section 7(c) authorizes the BOG to "establish the powers and duties" of the BOTs. The BOG, by regulation, has delegated various powers and duties to the BOTs, but the regulation did not delegate any authority directly to the individual universities. See BOG Reg. 1.001(1) ("The intent of this regulation is to delegate powers and duties to the university boards of trustees so that the university boards have all of the powers and duties necessary and appropriate for the direction, operation, management, and accountability of each state university.") (emphasis added); see also State University System Governance Agreement,[5] at (3)(c) (Mar. 24, 2010) (affirming

[4] This statute was enacted in an effort to harmonize and delineate the respective "constitutional duties" of the Legislature and the BOG pertaining to the state university system. See ch. 2005-285, Laws of Fla. Among the constitutional duties of the BOG recognized in this statute is the "responsibility for . . . [c]omplying with, and enforcing for institutions under the [BOG]'s jurisdiction, all applicable local, state, and federal laws." § 1001.705(2)(*l*), Fla. Stat.

"the exclusive authority of the BOG for delegating powers and duties to the boards of trustees of the universities") (emphasis added) (hereafter "Governance Agreement").

The BOG unquestionably has broad constitutional authority, but it is debatable whether that authority includes the law-trumping powers suggested by the dissent.[6] And, even if the BOG has the power to adopt regulations that

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[5] This agreement was entered into by the BOG, the Florida Senate, the Florida House of Representatives, and the Governor in the circuit court case that culminated in Graham v. Haridopolis, 108 So. 3d 597 (Fla. 2013). The agreement is available online at http://www.acad.usf.edu/News/Budget/docs/2010-03-24-SUS-Governance-Agreement.pdf.

[6] The majority and the dissent each make persuasive arguments on this constitutional issue, but as Judge Osterhaus' opinion correctly recognizes, it is simply not necessary to reach or resolve the issue in this case. If and when the BOG adopts a regulation such as the policy at issue in this case that conflicts with state law, the merits of the constitutional issue discussed by the majority and the dissent will be ripe for resolution. Cf. Fla. Pub. Empls. Council 79, AFSCME, AFL-CIO v. Pub. Empls. Rels. Comm'n, 871 So. 2d 270, 275 (Fla. 1st DCA 2004) (concluding that statute designating the "university board of trustees" as the public employer for university employees was "no longer enforceable" after the effective date of article IX, section 7, but affirming lower tribunal's decision because the BOG had adopted a resolution consistent with the statute designating each BOT as the public employer for its employees). NAACP and Decker do not resolve this issue as the dissent contends. Those cases did not address the scope or extent of the regulatory authority granted by article IX, section 7, nor did they discuss section 1001.705, Florida Statutes. Rather, those cases simply stand for the unremarkable proposition that actions taken by the BOG (NAACP) or a university (Decker) pursuant to authority derived from the constitution are not subject to the Administrative Procedure Act. Cf. § 120.52(1), Fla. Stat. (defining "agency" to exclude governmental entities acting pursuant to powers derived from the constitution); see also Governance Agreement, supra, at (5)(b) (requiring the BOG to comply with the Administrative Procedure Act when adopting rules to implement legislatively delegated authority "for subjects outside the scope of the BOG's constitutional authority"); § 1001.706(2)(b), Fla. Stat. (same).

supersede state law, nothing in BOG Regulation 1.001 authorizes the BOTs to exercise that power. Indeed, paragraphs (8)(e)[7] and (8)(f)[8] of the regulation require the BOTs to act in conformance with the law. See also Florida Board of Governors, Regulation Development Procedures for State University Boards of Trustees,[9] at § B.1. (July 21, 2005) ("Regulations must be consistent with law . . ."). Moreover, even if the BOTs had been delegated the law-trumping authority suggested by the dissent, that has no bearing on this case because the challenged policy was adopted by the university administration, not the university's board of trustees (hereafter "UNF BOT"),[10] and there is no indication that the UNF BOT delegated any of its purported BOG-delegated law-trumping powers to the administration.[11]

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[7] "Each board of trustees is responsible for compliance with all applicable laws, rules, regulations, and requirements." BOG Reg. 1.001(8)(e) (emphasis added).

[8] "Each board of trustees shall perform such other duties as provided by the Board of Governors, or as each board of trustees may determine are necessary or appropriate for the administration of the university so long as the trustees comply with any applicable laws and Board of Governors' regulations and policies." BOG Reg. 1.001(8)(f) (emphasis added).

[9] Available at http://www.unf.edu/uploadedFiles/president/trustees/RegulationDevelopmentProcedureforStateUniversityBoards%20of%20Trustees.pdf (hereafter "BOT Regulation Development Procedure").

[10] This point is significant because the procedure by which the university administration adopts policies differs markedly from the procedure by which the UNF BOT adopts regulations. Compare Univ. of North Fla. Policy 1.0010P ("Policy Creation and Development Process") with BOT Regulation Development Procedure, supra; see also Procedures and Policies for Promulgating Policies and Regulations (Univ. of North Fla. Aug. 2006) (available at https://www.unf.edu/president/policies_regulations/Internal_Procedures_for_Promulgating_Polices_and_Regulations.aspx).

Furthermore, even if we were to assume (1) that the BOG has the constitutional authority to adopt regulations that supersede state laws and (2) that it delegated that authority to the UNF BOT and (3) that the UNF BOT further delegated that authority to the university administration, there is no indication in the record that the administration exercised that authority here. First, as thoroughly discussed in Judge Osterhaus' opinion, the policy at issue in this case was adopted pursuant to authority the administration mistakenly thought it had under section 790.115(2)(a)3., Florida Statutes. Second, the university policy governing the adoption of policies expressly states that policies should not "conflict with provisions contained in laws" and that conflicting laws "shall take precedence over the policy." See UNF Policy 1.0010P, at § 2.

It is true, as the majority and the dissent note, that none of these points were argued in the trial court. But that does not matter. This analysis is not presented as an independent basis for reversal; it is simply presented to highlight what I consider to be the main flaw in the "tipsy coachman" basis for affirmance asserted by the dissent. I am not aware of any principle of appellate practice or procedure that would preclude consideration of this analysis (or that in Judge Osterhaus'

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[11] No such delegation of authority appears in the UNF BOT's bylaws (available at http://www.unf.edu/trustees/Bylaws.aspx), the resolution on presidential authority adopted by the UNF BOT (available at http://www.unf.edu/president/Resolution_on_Presidential_Authority.aspx), or the university's constitution (available at https://www.unf.edu/president/UNF_Constitution.aspx).

opinion) for purposes of evaluating the viability of the "tipsy coachman" argument asserted by the dissent.

Furthermore, principles of judicial restraint counsel against addressing issues – particularly constitutional issues – which are not squarely presented by the facts or which are not necessary to resolve the case before the court. Here, resolution of the constitutional issue injected by the original panel has no bearing on the outcome of this case because, as discussed above, the policy at issue in this case was not adopted by the BOG or pursuant to a clear delegation of the BOG's purported power to adopt law-trumping regulations. Accordingly, there was no need for the court to even address the constitutional issue in this case and the majority opinion should have simply left resolution of the issue to another day.

SWANSON, J., concurring.

I concur in the opinion of Judge Roberts. I specifically agree the trial court was in error when it relied upon section 790.115(2)(a)3., Florida Statutes (2011), to deny the requested relief below. In reversing the trial court, it is not necessary to disagree with the dissent's proposition that the firearms policy adopted by the University of North Florida (UNF) could emanate from the power vested in the state university system and the statewide Board of Governors (the Board) by the terms of article IX, section 7 of the Florida Constitution. The Board has broad power to operate, regulate, control and be fully responsible for the management of the whole university system. That power, as vested in the Board and standing alone does not, however, give UNF the authority to restrict a citizen's right to lawfully possess a firearm in their automobile, as authorized by the Legislature in section 790.251, Florida Statutes (2011).

An argument can be made that the Board could take such action under section 1001.706(7)(b), Florida Statutes (2011). Section 1001.706(7)(b) states in pertinent part:

> **(7) Powers and Duties relating to property.—**
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> . . . .
>
> (b) The Board of Governors **shall** develop guidelines for university boards of trustees relating to the use, maintenance, protection, and control of university-owned or university-controlled buildings and grounds, property and equipment, name, trademarks and other proprietary marks, and the financial and other resources of the university. Such authority **may** include placing restrictions on

> activities and on access to facilities, **firearms**, food, tobacco, alcoholic beverages, distribution of printed materials, commercial solicitation, animals, and sound. The authority provided the board of trustees in this subsection includes the prioritization of the use of space, property, equipment, and resources and the imposition of charges for those items.

(Emphasis added.) While the Board arguably could develop guidelines to restrict on-campus access to firearms legally possessed in one's automobile, no such guidelines have been promulgated.

The analysis in this case begins with the Legislature's intent to occupy "the whole field of regulation of firearms" in section 790.33(1), Florida Statutes (2011). One then looks to the Legislative delegation of the power to restrict access to firearms as given the Board by way of section 1001.706(7)(b), and the Board's authority to develop guidelines regarding the control of firearms. Operative statutory language material to prohibiting secured firearms in conveyances parked on campus is that the **Board's** authority "**may** include placing restrictions on . . . access to . . . firearms[.]" § 1001.706(7)(b), Fla. Stat. (2011) (emphasis added). Pursuant to the above-referenced statutory authority, the Board has implemented a regulation. Board of Governors' Regulation 1.001(7)(g) states in full:

> Each board of trustees shall be responsible for the use, maintenance, **protection**, and control of, and the imposition of charges for, university-owned or university-controlled buildings and grounds, property and equipment, name trademarks and other proprietary marks, and the financial and other resources of the university.

(Emphasis added.) This regulation only generally addresses a university's responsibility for the protection of its buildings and grounds. It does not address firearms lawfully possessed in one's automobile. The Board's regulatory silence on the lawful possession of a firearm, as authorized by section 790.251, is dispositive. Thus, even if this court concluded the Board could abrogate a citizen's right to lawfully have a firearm in one's car while on campus, the Board has not exercised that power.

In contrast, the Legislature has accorded the right to the citizens of this state "for self-defense" to possess a "securely encased" firearm in their private conveyances. See § 790.25(5), Fla. Stat. (2011). While it may be argued the Board is not precluded by the preemptive provisions of section 790.33(1) from limiting or restricting that right, no specific action has been taken pursuant to section 1001.706(7)(b) to effectuate that purported power.

I concur with the majority's decision to reverse the trial court's order of dismissal and order denying injunctive relief.

MAKAR, J., concurring with opinion.

I concur in the opinions of Judges Roberts and Osterhaus, and write separately to emphasize that Florida's legal history on the right to keep and bear arms makes this a straightforward case. I also suggest that when panels ask the parties to address constitutional or other issues of statewide importance not raised in the briefing process, the Attorney General of the State of Florida should be notified so that she can choose to exercise her right to be heard on such matters.

I.

In Florida, the constitutional right of the people to keep and bear arms in defense of themselves is older than the State itself. The right dates back 175 years to the 1838 Florida Constitution,[12] adopted by the Territory of Florida (formerly East Florida and West Florida), which was seeking admission into the Union at that time. Florida was admitted as the twenty-seventh State in 1845, and the constitutional right—with only a small gap[13]—has endured ever since.[14]

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[12] Article I, section 21 of the 1838 Constitution stated: "That the free white men of this State shall have the right to keep and to bear arms, for their common defense." The 1861 Constitution retained this language; the racial and gender restrictions were eliminated in the 1868 Constitution.

[13] When enacted, the 1865 Constitution omitted the right, but it was soon added back to the 1868 Constitution, which stated: "The people shall have the right to bear arms in defense of themselves and of the lawful authority of the State." Art. I, § 22, Fla. Const. (1868).

[14] See Art. I, § 8, Fla. Const. (1968) ("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

It is a personal, individual liberty, entitled to protection like other constitutional rights.[15] Like any civil right established in the state or federal constitutions, the legislative branch may choose to pass laws designed to facilitate its exercise or protect against its infringement, which Florida's legislature has done repeatedly over the past fifty years on the specific topic at issue: safely-secured firearms in motor vehicles.[16]

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infringed, except that the manner of bearing arms may be regulated by law."); Art. I, § 20, Fla. Const. (1885) ("The right of the people to bear arms in defense of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may prescribe the manner in which they may be borne.").

[15] Unlike the Second Amendment, the constitutional right of people to keep and bear arms in Florida is one that explicitly includes self-defense. Id. The national debate about whether the Second Amendment establishes such a personal right in defense of oneself, begun in earnest in the 1980s, pointed out that advocates of other civil liberties in the Bill of Rights ignored the Second Amendment, relegating it to marginalia in texts and treatises, if it was mentioned at all. See, e.g., Sanford Levinson, The Embarrassing Second Amendment, 99 Yale L.J. 637, 640 (1989) (noting that major texts of the time "marginalize the Amendment by relegating it to footnotes; it becomes what a deconstructionist might call a 'supplement' to the ostensibly 'real' Constitution that is privileged by discussion in the text.").

[16] This case is limited to only this topic; it is not about "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." Dist. of Columbia v. Heller, 554 U.S. 570, 626-27 (2008). Firearms in school buildings—or on school properties—are generally not allowed (recognizing exceptions for vehicles, firearm training classes, and career centers with firearms training ranges) § 790.115 (2)(a), Fla. Stat. (2013); see also § 790.06(12)(a) (disallowing weapons of concealed permit holders at public school meetings, school or college events, or in elementary or secondary school facilities or buildings).

As far back as 1965, the legislature made clear that the people have the right to travel in their vehicles with firearms that are secured in a way that renders them inaccessible for immediate use. Ch. 65-410, Laws of Fla.; see § 790.25(3)(l), Fla. Stat.[17] Throughout this law's history, the legislature has demanded that this right be liberally construed in favor of its exercise. § 790.25(4), Fla. Stat..[18] In 1982, the Legislature strengthened and reinforced this right, making clear that people have the right "to possess a concealed firearm or other weapon for self-defense or other lawful purposes within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily

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[17] Chapter 65-410 created section 790.25, whose subsection three created fourteen categories of "Exceptions" to the general prohibition against carrying concealed weapons without a permit, including an exception for "(l) Any 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 persons [sic] manual possession." Other than a grammatical change, the language of subsection 3(l) has remained unchanged.

[18] Subsection 790.25(4), also created by Chapter 65-410, stated, and still states, as follows:

> **(4) Construction.--**This act shall be liberally construed to carry out the declaration of policy herein and in favor of the constitutional right to keep and bear arms for lawful purposes. This act is supplemental and additional to existing rights to bear arms now guaranteed by law and decisions of the courts of Florida, and nothing herein shall impair or diminish any of such rights. This act shall supersede any law, ordinance, or regulation in conflict herewith.

§790.25(4), Fla. Stat. (2013).

accessible for immediate use." Ch. 82-131, Laws of Fla. Almost thirty years ago, the Florida Supreme Court upheld this right in Alexander v. State, 477 So. 2d 557, 558 (Fla. 1985), concluding that an employee sitting in his parked car in the employer's parking lot has a right to possess a zippered pouch containing a firearm.

Handgun safety on school and school district property was a major concern in 1992 when the legislature enacted laws criminalizing conduct involving the possession of firearms and other specified weapons on school property. Ch. 92-130, Laws of Fla. In doing so, however, the legislature explicitly recognized as a lawful right—one under section 790.25, entitled "Lawful ownership, possession, and use of firearms and other weapons"—to have a firearm safely-secured in a vehicle on school property. § 790.115(2)(a)(3), Fla. Stat.[19] The legislature made the judgment that a safely-secured firearm in a vehicle is permissible, even if that vehicle is parked in a lot or garage on school property. Because of greater sensitivities about K-12 district schools, the legislature carved out an exception: any of the sixty-seven "school districts" may adopt a contrary policy "for purposes

[19] Section 790.115(2)(a)(3) states as one of the exceptions to the prohibition of weapons on school property or at school sponsored events that "a person may carry a firearm: . . . 3. In a vehicle pursuant to s. 790.25(5); except that school districts may adopt written and published policies that waive the exception in this subparagraph for purposes of student and campus parking privileges." It also states that: "For the purposes of this section, 'school' means any preschool, elementary school, middle school, junior high school, secondary school, career center, or postsecondary school, whether public or nonpublic."

of student and campus parking privileges" but schools—including universities—lack that authority. Id. The statute's core provisions are unchanged over the last two decades.

The main purpose underlying these five decades of legislative protection of the right to a safely-secured firearm in a motor vehicle, and two decades of explicit protection of the right on school property, is the legislative judgment that persons desiring to exercise their right to keep and bear arms not be forced to leave their firearms at home when they travel by motor vehicle, sometimes through potentially dangerous neighborhoods or en route to engage in other lawful activities such as target shooting or hunting, as two examples. This purpose is highlighted in a recently enacted related law, section 790.251(4)(a), Florida Statutes, the "Preservation and Protection of the Right to Keep and Bear Arms in Motor Vehicles Act of 2008," which strengthened existing legal protections for certain persons such as employees and customers who have secured firearms in their vehicles at private businesses.[20]

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[20] The Act was subject to a broad constitutional challenge, including the claim that the State lacked authority to impose the Act's restrictions, but the only provision held impermissible was a portion of the Act distinguishing between businesses with/without an employee with a concealed firearms permit. Fla. Retail Fed'n, Inc. v. Att'y Gen. of Fla., 576 F. Supp. 2d 1281 (N.D. Fla. 2008), entering judgment, 576 F. Supp. 2d 1301 (N.D. Fla. 2008). The court enjoined only a part of the Act to the extent it made this distinction, leaving the remainder in place, giving both sides reason to declare victory. The court, however, made no holding that limited the legislature's fundamental power to enact laws protecting the rights of those who exercise the right keep/bear arms. Indeed, its ruling says nothing to undermine the

However one views the advisability of the constitutional right to keep and bear arms generally, or the statutes facilitating the manner in which the right is exercised, the entire history on the subject demonstrates that the legislature has specifically and repeatedly protected the right of the people to have safely-secured guns in their vehicles for purposes of self-defense and other lawful purposes. This history makes this an easy case.

With the backdrop of 175 years of constitutional protection for the right to keep and bear arms in self-defense, supplemented by fifty years of statutory protection of the specific right to have a secured firearm in one's vehicle, the university's policy—as laudable as it may be—directly conflicts with this legal history. As Judge Roberts explains, a university's general powers to administer its affairs under article IX, section 7 of the Florida Constitution and related statutes, does not trump this legal history. Whatever can be said of the state constitutional and statutory powers of universities, the Florida Constitution specifies without qualification that the "manner of bearing arms may be regulated by law." Art. I, § 8(a), Fla. Const. The use of the phrase "by law" places this authority exclusively in the legislative branch.[21] Placing limitations on the right to bear arms is a

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authority of the legislature to regulate the manner of bearing arms on state-owned property, which is at issue here.

[21] See Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 267 (Fla. 1991) (interpreting phrase "made by law" in Florida constitution to mean only the legislative branch because it alone has the lower to make "law"); Grapeland

quintessentially legislative function[22] under the Florida Constitution, which does not textually limit the right to bear arms to a particular place, such as in defense of the home only.[23] Rather, it speaks only in terms of the "right of the people to keep and bear arms in defense of themselves" without limiting where that self-defense might occur.[24] Exercising its exclusive constitutional authority, the legislature has

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Heights Civic Ass'n v. City of Miami, 267 So. 2d 321, 324 (Fla. 1972) (use of the word "law" in state constitution "means an enactment by the State Legislature" not any other political bodies.).

[22] As Justice Scalia noted in Heller, 554 U.S. at 626-27, laws that forbid "the carrying of firearms in sensitive places such as schools and government buildings" are presumptively permissible; but such laws are the province of the legislature to enact, not via unauthorized university policies.

[23] Whether the right is tethered to the home, or extends beyond, is addressed in recent cases from federal and state courts. Compare Moore v. Madigan, 702 F.3d 933, 942 (7th Cir. 2012) (explaining that the Second Amendment includes right to possess and use firearm outside the home for self-defense; invalidating overbroad statute criminalizing carrying of firearm other than at one's home or place of business, or on one's own land) ("The Supreme Court has decided that the amendment confers a right to bear arms for self-defense, which is as important outside the home as inside."); and People v. Aguilar, 2013 IL 112116 (2013), (adopting Moore), with Drake v. Filko, 724 F.3d 426 (3d Cir. 2013) (law requiring applicant show a "justifiable need" to carry handgun for self-defense in public is a "presumptively lawful" and "longstanding" regulation that does not burden Second Amendment rights; noting, but not holding, that "Second Amendment's individual right to bear arms may have some application beyond the home."); and Woollard v. Gallagher, 712 F.3d 865, 876 (4th Cir. 2013) (assuming that "right exists outside the home" but upholding law requiring applicants show "good and substantial reason" for obtaining handgun permit under intermediate scrutiny test).

[24] The United States Supreme Court has given meaning to the phrase "bear arms," noting that "[a]t the time of the founding, as now, to 'bear' meant to 'carry.' . . . When used with 'arms,' however, the term has a meaning that refers to carrying for

made the policy judgment that having secured weapons in motor vehicles on school property is a protected right. A university—which, unlike the legislature, lacks any specific constitutional authority to regulate on this topic—cannot override that judgment. This lack of constitutional authority empowering the university to regulate the manner of bearing arms is decisive.[25] Even if it were not, to the extent the university believes its statutory authority should prevail, its general authority under section 1001.706(7)(b), Florida Statutes, is subordinate to the more specific statutes allowing safely-secured guns in vehicles.[26] As Judge Osterhaus explains, universities lack the power to sweep aside the long-standing statutory protection of the right to have secured firearms in vehicles under the

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a particular purpose—confrontation." Heller, 554 U.S. at 584.

[25] Much like the legislature's exclusive appropriation power in the Florida Constitution, the legislature's exclusive authority to regulate the manner of bearing arms in article I, section 8, negates any such authority within the university system. Graham v. Haridopolos, 108 So.3d 597, 605 (Fla. 2013). Moreover, this exclusive legislative power is of a "wholly different nature" than "the executive and administrative functions delineated in the constitutional provision and therefore is not included in the meaning of 'operate, regulate, control, and be fully responsible for the management of the whole university system.'" Id.

[26] Many cases hold similarly. See, e.g., Adams v. Culver 111 So. 2d 665, 667 (Fla. 1959) ("It is a well settled rule of statutory construction . . . that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms."). Only when there is a "hopeless" inconsistency between two statutes—which is not the case here—does a more recently enacted one prevail. State v. Parsons, 569 So. 2d 437, 438 (Fla. 1990).

pretense that they are "school districts" implementing "noncriminal" policies or regulations. In addition, reading the general language of article IX, section 7 of the Florida Constitution broadly would effectively create a fourth branch of government, one with "edu-slative" powers that trump those of the legislative branch; nothing in the language of the amendment or its ballot title or summary[27] suggested such a dramatic alteration to the fundamental three-branch structure of the state constitution.

Finally, merely because this case involves a policy that regulates student conduct does not grant the university immunity from the state and federal constitutions or statutory rights. It is worth noting that if a university, by administrative policy, could override a long-standing right of the people, including adult students, then seemingly little would stand in the way of a university policy that conflicted with, for example, environmental, health, or public safety laws or perhaps other constitution freedoms or statutory rights. If universities can regulate away a Second Amendment right, why not a First Amendment one? Or one

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[27] The Florida Supreme Court concluded that because "the proposed amendment does not substantially affect or alter any provision in the state constitution, the ballot summary is not defective in this regard." In re Advisory Op. to Att'y. Gen. ex rel. Local Trustees, 819 So.2d 725, 732 (Fla. 2002). As in Haridopolos, the ballot title and summary nowhere indicate that voters or framers intended that constitutional authority to regulate the manner of bearing arms be shifted from or shared by the legislature. 108 So.3d at 605 ("Nowhere in the ballot title or ballot summary does it indicate that the voters or framers intended for the Board of Governors to have authority over the setting of and appropriating for the expenditure of tuition and fees.").

protected by the Fourth or Fifth Amendment? This point is rhetorical, but nonetheless meaningful because campus authority unchecked can go astray of constitutional norms in many ways. See, e.g., Widmar v. Vincent, 454 U.S. 263 (1981) (exclusionary policy prohibiting student religious group from using university facilities open to other groups violates principle of content neutrality); Goss v. Lopez, 419 U.S. 565 (1975) (temporary suspension from school without notice and chance to rebut charges violates due process); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (prohibition on wearing non-disruptive armband unconstitutional). From these substantive points, the next section shifts to a procedural one.

II.

Appellate judges are a curious lot; they tend to ask questions litigants have not answered and seek answers to questions litigants have not asked. From time to time, an appellate panel may decide that an important legal issue is present in a case that the parties have either not fully developed or perhaps not raised directly at all. Taking the next step, the panel asks the parties to be prepared to address or brief the court on the issue identified.[28]

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[28] Other options exist. As one author notes:

> What should happen when an appellate court looks at the briefs and arguments presented by the parties and feels that the issue has not been framed correctly? When appellate judges believe that a potentially dispositive issue was missed by the parties, they have

That is what happened here. On March 12, 2013, the panel sua sponte ordered that the counsel of record "shall be prepared to address the following issues at oral argument[ ]"

> 1. Does a state university have independent authority under Article IX, section 7 of the Florida Constitution as interpreted in Graham v. Haridopolos, 2013 WL 362773 (Fla. 2013) and NAACP, Inc. v. Florida Board of Regents, 876 So. 2d 636 (Fla. 1st DCA 2004) to adopt a noncriminal policy or regulation concerning the possession of firearms on campus, irrespective of any right it may have under section 790.115(2)(a)(3), Florida Statutes, to waive the exception that would allow a student to possess a firearm in a vehicle?
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> 2. Does the University of North Florida qualify as a "local or state government" such that its policies and regulations could be preempted by section 790.33, Florida Statutes?
>
> 3. Does the provision of the student handbook at issue in this case qualify as an "ordinance," "rule" or "administrative regulation" within the meaning of section 790.33, Florida Statutes?

> several options: (1) they can ignore the issue; (2) they can spot the issue in their opinion, but treat it as not properly raised or waived; (3) they can spot the issue and remand it for resolution in the first instance in the trial court; (4) they can ask the parties for supplemental briefs before deciding the issue; (5) they can decide the issue without briefs; (6) they can spot the issue in the opinion, and write dicta.

Barry A. Miller, Sua Sponte Appellate Rulings: When Courts Deprive Litigants Of An Opportunity To Be Heard, 39 San Diego L. Rev. 1253, 1256 (Fall 2002) (footnote omitted). Another author notes that "possible approaches to this question range widely from a strict prohibition against raising outside arguments or other considerations to an absolute duty to find the one best theory on which to decide the case." Sarah M. R. Cravens, Involved Appellate Judging, 88 Marq. L. Rev. 251, 254 (Fall 2004).

> If, after the oral argument, it appears that any of these issues may have an effect on the disposition of the case, the parties will be given an opportunity to submit supplemental briefs.

Neither in the trial court nor on appeal had the university sought to rely upon its "independent authority" under the Florida Constitution for its policy. Oral argument was held on March 19, 2013. Three days later, the panel ordered that the "parties may file supplemental briefs directed to the issues identified by the court in its order dated March 12, 2013." In both orders, the panel notified only the counsel of record for the two parties involved, i.e., the plaintiffs and the university. No notice was provided to any official in state government.

The practice of an appellate panel asking that counsel be prepared to address specific issues at oral argument, or to file supplemental briefs on designated topics, is an accepted and useful one. It is infrequently invoked, perhaps because it imposes expense on the parties and potentially delays the process. But it provides a twofold benefit: litigants get a preview of what judges are thinking, and judges get direction from litigants on the issues identified.[29]

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[29] If a court raises new issues not presented by an appellant, the practice can run counter to the fundamental principle that an issue is waived if not raised on appeal. Differing views exist, though the following are general guidelines:

> Generally, supplemental briefs may be filed pursuant to the provisions of the relevant appellate rules or by the consent of the court, subject to the restriction that an issue or claim may not be asserted for the first time in a supplemental brief. However, when the claim implicates fundamental constitutional rights, the court may consider a claim that was not included in the original brief and is raised in a supplemental

Notice to only the parties' counsel makes sense in the run-of-the-mill case, one not having far-reaching implications or addressing issues of limited scope. But

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> brief. Courts may require that supplemental briefs be filed for issues not raised by the parties or when there remains confusion or doubt concerning an issue. Whether courts allow supplemental briefs to be filed depends in part on the timing of the request in relation to the status of the appeal.

5 Am. Jur. 2d Appellate Review § 519 (2013) (footnotes omitted). In the context of Anders briefs, the Florida Supreme Court has broadly said that "an appellate court can order supplemental briefs in any case before it, regardless of the type of brief originally filed." In re Order of First Dist. Ct. of Appeal Regarding Br. Filed in Forrester v. State, 556 So. 2d 1114, 1117, 1115 (Fla. 1990) ("We approve the district court's requiring supplemental briefs as being within the inherent powers of the court."). In a non-Anders context, Judge Cope, writing for himself, noted that it "appears that an appellate court has the power to order supplemental briefing and to consider the briefs when filed. This amounts to an exception to the waiver rule" that would otherwise foreclose review of new issues raised by the court absent fundamental error. R & B Holding Co., Inc. v. Christopher Adver. Grp., Inc., 994 So. 2d 329, 336-37 (Fla. 3d DCA 2008) (Cope, J., concurring in part, dissenting in part) ("court has the discretion to order supplemental briefs on an issue raised by the court sua sponte."). The Eleventh Circuit, for example, has a strict standard:

> Parties must submit all issues on appeal in their initial briefs. When new authority arises after a brief is filed, this circuit permits parties to submit supplemental authority on "*intervening* decisions or *new* developments" regarding issues already properly raised in the initial briefs. Also, parties can seek permission of the court to file supplemental briefs on this new authority. But parties cannot properly raise new issues at supplemental briefing, even if the issues arise based on the intervening decisions or new developments cited in the supplemental authority.

United States v. Nealy, 232 F.3d 825, 830 (11th Cir. 2000) (internal citations omitted). See also Miller, supra note 17 at 1307-08 (contrasting adversary process model, which focuses narrowly only on issues raised by parties and applies waiver rule rotely, with equity model, which focuses more broadly on achieving justice—or avoiding injustice—and applies waiver rule less strictly).

when the legal issues raised are weighty and affect constitutional rights, the structure of government, or statutory interpretation matters of statewide importance, as examples, it behooves the panel—and promotes due process and judicial decision-making—to include in the notification process, at a minimum, the state's chief legal officer: Florida's Attorney General, who is a critical stakeholder in defending the validity and constitutionality of the state's laws. As this Court recently said:

> The Attorney General is in many ways no ordinary litigant. She has important and far-ranging responsibilities, including the "power to institute litigation on [her or] his own initiative." State ex rel. Shevin v. Exxon Corp., 526 F.2d 266, 271 (5th Cir.1976). Section 16.01(4), Florida Statutes (2011), provides that the Attorney General "[s]hall appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal or in equity, in which the state may be a party, or in anywise interested, in the Supreme Court and district courts of appeal of this state." Under this statute, as at common law, the Attorney General has broad authority to litigate matters in the public interest:
>
> > [I]t is the inescapable historic duty of the Attorney General, as the chief state legal officer, to institute, defend or intervene in, any litigation or quasi-judicial administrative proceeding which he determines in his sound official discretion involves a legal matter of compelling public interest . . .
> >
> > The courts of this state have long recognized this advocacy authority, and litigation duty of the Attorney General. It derives from the common law and in only rare instances has the Legislature otherwise provided. [citations omitted]
>
> State ex rel. Shevin v. Yarborough, 257 So. 2d 891, 894–95

> (Fla.1972) (Ervin, J., specially concurring). We recognize that the "office of the Attorney–General is a public trust . . . [and that s]he has been endowed with a large discretion . . . in . . . matters of public concern," State v. Gleason, 12 Fla. 190 (Fla.1868), and acknowledge and affirm the Attorney General's "discretion to litigate, or intervene in, legal matters deemed by him [or her] to involve the public interest . . . and [that] his [or her] standing . . . can not be challenged or adjudicated." Id. at 895 (Ervin, J., specially concurring). See also Thompson v. Wainwright, 714 F.2d 1495, 1500–01 (11th Cir.1983).

Bondi v. Tucker, 93 So. 3d 1106, 1109 (Fla. 1st DCA 2012).

In Bondi, this Court held that despite the Attorney General's broad and unquestioned authority to intervene as a party in any matter in which the State's interest are implicated, she must still seek formal leave to do so to acquire standing. Notably, this issue was not raised by the parties. Pertinent here, the panel in Bondi sua sponte notified counsel as follows:

> At oral argument scheduled for June 27, 2012, the parties should be prepared to address the questions of whether the matter is moot or inevitably will be moot before a decision can be rendered; whether the Attorney General has standing; and whether a nonparty in the proceeding below may perfect an appeal and confer jurisdiction on this court.

Order, Bondi v. Tucker, No. 1D11-5935 (Fla. 1st DCA June 18, 2012) (emphasis added). Notification in Bondi—obviously—included notification to the Attorney General, who was as a named party. In addition, the issues raised went to the Court's jurisdiction, which is a matter that can be raised at any time. In contrast, the supplemental issues raised here do not go to jurisdiction; they were neither raised nor briefed below and, ordinarily, would be waived on appeal.

Which returns us to the main point: as a matter of inter-branch comity it ought to be the rule that whenever a panel notifies counsel in an appeal that an issue of constitutional concern or statewide importance has arisen, particularly when the parties have not raised the issue themselves, the Attorney General must also be notified. This did not occur in this case, the panel only notifying the parties; nor has the en banc court done so. The point is not that an appellate panel ought to refrain from seeking guidance on constitutional or similar issues; they should do so if deemed important to resolution of the appeal as the panel in this case believed.

Rather, the point is that notification to the Attorney General on such important legal issues should be a matter of course, not a matter of chance. I speak with some experience, having served two Attorneys General in the Office of the Solicitor General[30] over five years. During that time, it was a ceaseless worry—and a constant reality—that constitutional issues important to state government were being litigated throughout the state and federal courts in Florida (and sometimes beyond) without our office being aware of them until it was too late to intervene or

[30] The Office of the Solicitor General routinely files amicus briefs and intervenes in cases of statewide and constitutional importance on behalf of the Attorney General. See Rachel E. Nordby, Florida's Office of the Solicitor General: The First Ten Years, 37 Fla. St. U. L. Rev. 219, 222 (2009) (OSG "is based on the theory that a unit within the Attorney General's Office should be devoted solely to appellate work involving the state's interests. By selecting cases to work on through careful analysis of the interests and legal questions at issue, the OSG keeps its caseload manageable and provides devoted attention to cases that significantly implicate Florida's interests.").

otherwise be heard on the matter. Most often, it was the lack of compliance below with section 86.091, Florida Statutes, which requires in declaratory judgment actions that if a "statute, charter, ordinance, or franchise is alleged to be unconstitutional, the Attorney General or the state attorney of the judicial circuit in which the action is pending shall be served with a copy of the complaint and be entitled to be heard."[31] But sometimes it was the judicial branch's failure to notify executive branch stakeholders of questions raised similar to those in this proceeding.

One could argue that if an issue is important enough, a party in the litigation would contact and request that the Office of the Attorney General seek intervention as a party or appear as an amicus; and, indeed, that happens with some regularity. A far better approach, one eliminating the element of serendipity, is simply to provide notice to the Attorney General as a matter of course so that she can decide whether to weigh in on the issues presented. This protocol could be followed as a matter of informal judicial policy, pursuant to an internal operating procedure or an official court rule, or via a legislative amendment to the Laws of Florida. However

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[31] See also Fla. R. Civ. P. 1.071 (requiring that "a party that files a pleading, written motion, or other paper drawing into question the constitutionality of a state statute . . . must promptly (a) file a notice of constitutional question stating the question and identifying the paper that raises it; and (b) serve the notice and the pleading, written motion, or other paper drawing into question the constitutionality of a state statute . . . on the Attorney General . . . by either certified or registered mail." (emphasis added).

it is to be accomplished, notification to the Attorney General is important in cases of constitutional and statewide importance and is a courtesy that strengthens inter-branch relations.

OSTERHAUS, J., concurring in result.

I concur with part I of the majority opinion and in the result, but think this case should be resolved entirely as a matter of statutory construction, which is how the parties presented it and the trial court resolved it below. Reversal is warranted for the simple reason that § 790.115(2)(a)3 allows "school districts" to waive the exception for storing a firearm in a vehicle, but not universities like UNF. On this single point of statutory construction the whole court agrees and I think this point is dispositive.[32]

I do not think it is necessary, however, for the majority to embark on an expansive constitutional analysis of the legislature's and universities' comparative authority to regulate firearms. This is a simple statutory case that does not require plowing new constitutional ground. Even though the dissenting opinion invites a sweeping constitutional debate, the best response to it is explaining how the dissent's constitutional views are irrelevant to resolving this particular case, as discussed below. Far from an endorsement (as the majority contends), a modest, nonconstitutional response to the dissent is consistent with the custom that courts should refrain from making unnecessary constitutional rulings. See, e.g., In re

[32] It bears repeating that this case involves only a narrow aspect of Florida's firearms laws. Whereas Florida law widely bans the possession of firearms at schools, an exception allows adults to store a firearm *inside a vehicle* at a school if it is securely encased or otherwise not readily accessible for immediate use. § 790.115(2)(a)3, Fla. Stat. Only "school districts" may waive this exception. Id.

Holder, 945 So. 2d 1130, 1133 (Fla. 2006) (noting that "we have long subscribed to a principle of judicial restraint by which we avoid considering a constitutional question when the case can be decided on nonconstitutional grounds").

The constitutional issue addressed by the dissent did not originate with the parties and is immaterial to resolving this case. After the parties had litigated a basic statutory issue in the trial court below and then filed narrow, statute-focused briefs in this court, the panel injected the following constitutional question:

> Does a state university have independent authority under Article IX, section 7 of the Florida Constitution . . . to adopt a ***noncriminal*** policy or regulation concerning the possession of firearms on campus, ***irrespective of any right it may have under section 790.115(2)(a)3., Florida Statutes***, to waive the exception that would allow a student to possess a firearm in a vehicle?

(Emphasis added). The parties had not addressed this issue before, but acceded to the panel's request for responses. UNF answered the panel's question affirmatively at oral argument and in a supplemental filing. And on this basis the dissent would now affirm UNF's policy.

But the question put to the parties and the dissent's tipsy coachman analysis do not fit this case because UNF's policy is neither non-statutory, nor noncriminal as assumed by the question. First, UNF's policy is entirely bound up with § 790.115(2)(a)3. Whereas the dissent characterizes UNF's policy as being adopted "pursuant to authority granted to the university by the Board of Governors

under Article IX, section 7," UNF's policy says different. Over and over again, UNF's policy invokes § 790.115 and identifies the law as the reason for its existence:

> **I. OBJECTIVE & PURPOSE**
> To clarify the University of North Florida's weapons policy while remaining consistent with Florida law.
>
> **II. STATEMENT OF POLICY**
> University of North Florida is a "school" based on the established definitions in ***Section 790.115, Florida Statutes***. Except ***as specifically provided in Section 790.06(12)(a)(13), Florida Statutes***, students must not have any type of weapon or destructive device ***as defined in Section 790.001, Florida Statutes***, in their possession and cannot store such weapons or destructive devices in their vehicle while on any University property or University-controlled property. * * *
>
> ***Section 790.115(2)(a), Florida Statutes***, prohibits possessing weapons or firearms on school property. Although ***s. 790.115(2)(a)3, Florida Statutes***, provides that a person may carry a firearm in a vehicle ***pursuant to s. 790.25(5)***, it provides that schools may provide written and published policies waiving the exception.
> ***In accordance with the foregoing, the University of North Florida specifically waives the exception provided in Section 790.115(2)(a)(3), Florida Statutes,*** meaning that UNF students must not have any type of defined weapon in their possession and cannot store a weapon in their vehicle while on any University or University-controlled property. . . .

Weapons and Destructive Devices on Campus, Policy 14.0080P, Univ. N. Fla. (Sept. 30, 2011) (emphasis added). Not only is UNF's policy anchored in § 790.115, but it states an "[o]bjective & [p]urpose" of "remaining consistent with Florida law."[33] In consequence, the panel's question of whether a university could

regulate firearms constitutionally and "irrespective of . . . § 790.115(2)(a)3" (as well as the answer to this question) lends no help towards resolving the challenge here involving UNF's policy that explicitly exists to exercise the *statutory* waiver within § 790.115(2)(a)3, incorporating *statutory* definitions and *statutory* penalties.

Tellingly, UNF's own arguments do not ignore the link between its policy and § 790.115(2)(a)3, or shrink from its intention to enforce this particular statute against students. Swearing off constitutional arguments, UNF defended its policy squarely on statutory grounds. It told the trial court, for instance, that:

> [T]his is not a case under the . . . United States Constitution or Florida Constitution. . . . It's clear from legislation that the Florida legislature has announced an intent to, within certain circumstances, provide for the citizens of Florida to bear arms. But we submit that there are exceptions and we're before the Court on that exception.

UNF's answer brief also emphasized its policy's *statutory* basis:

> [UNF] adopted this policy pursuant to the provisions of Florida Statute §790.115(2)(a)3 as supported by Florida Statute §790.251, as it is a "school" clearly within the definition of the word "school" as specifically defined in the precise statute at issue.
> * * *

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[33] In fact, UNF adopts all of its policies—as it did with the policy here—in subordination to Florida's laws. Policy 1.0010P sets forth "Policy Creation and Development" parameters by requiring that: "Policies should [not] conflict with provisions contained ***in laws***" and "[w]hen a subsequently promulgated law . . . conflicts with an existing University policy, such law . . . shall take precedence over the policy." Policy Creation and Development Process, Policy 1.0010P, Univ. N. Fla. (June 1, 2001) (emphasis added), *available at* http://www.unf.edu/president/policies_regulations/01-General/1_0010P.aspx. Cf. Grapeland Heights Civic Ass'n v. City of Miami, 267 So. 2d 321, 324 (Fla. 1972) (interpreting the term "law" to mean an enactment by the legislature).

> Distilled to its essence then, the issue before this Court is: is the University of North Florida a land owner/institution/school reasonably within the authority recognized by Florida Statutes to enact such written and published policies?
> * * *
> As will be demonstrated below, there are at least three statutes from the many firearms-related statutes in Florida that directly bear upon the decision of the trial court below and, as a result, those statutes must be considered *in pari materia* before this Court can determine whether UNF had the authority to bar guns from cars on its campus, or not.
> * * *
> The Appellants [note], correctly, that the Legislature has the power to, and has sometimes exercised that power to, preempt certain areas of law or regulation. [Citation omitted]. The regulation of firearms in the State of Florida is one of those areas in which the Legislature has stated that it <u>does</u> intend to preempt the field[.] . . . The Appellees have no quarrel with this preemption concept[.]

Indeed, UNF's brief conceded twice that it would lose this appeal if the Appellants' interpretation of the statute prevailed:

> It is certainly acknowledged by that, if no other statutes in Florida are read in conjunction with [§790.25(5)], Appellant Lainez would not be committing a crime if she kept her handgun securely encased in her car, anywhere in the state of Florida. Conceded.
> * * *
> UNF further readily acknowledges, that should this Court accept . . . Appellants' [statutory] contention . . . then UNF [is] precluded from . . . banning guns from student vehicles.

Furthermore, UNF's brief acknowledged that the parties committed themselves to the statutory focus of this litigation:

> [T]he issue was, by agreement of the parties, framed so as to present a clear legal issue to the trial court; and the parties have acknowledged and committed themselves to the presentation of this legal issue to this

> Court—was the trial court correct when it determined that UNF could preclude students from bringing firearms onto its property, even when the firearms were located in a private conveyance and locked in a secure container.

In sum, the first reason that the panel's question and the dissent's corresponding tipsy coachmen-based constitutional analysis are irrelevant is that they do not fit UNF's situation here. They assume away the statutory scheme at the heart of the policy that UNF is enforcing against its students as if UNF were defending its own free-standing firearms regime. It isn't. UNF's policy exercised the statutory waiver within § 790.115(2)(a)3's scheme and the question for this court is whether it could lawfully do so. The different question of whether UNF could adopt its own regulatory scheme independent of § 790.115(2)(a)3 is immaterial to resolving the issue here of whether UNF can enforce this particular policy and statute against Ms. Lainez and other students.

The second problem with the panel's question and the dissent's tipsy coachman analysis is that it addresses only a *noncriminal* policy: "Does a state university have independent authority under Article IX, section 7 of the Florida Constitution . . . to adopt a ***noncriminal*** policy[?]" (Emphasis added.) This question might be relevant if UNF's policy provided only for run-of-the-mill academic consequences against violators, i.e., academic probation, suspensions, and the like. But it doesn't. UNF's policy, by waiving the statutory exception under § 790.115(2)(a)3, subjects students to serious criminal charges. See

§ 790.115(2)(c)1, Fla. Stat. ("A person who . . . possesses any firearm in violation of this subsection commits a felony of the third degree[.]"). UNF's Student Handbook (as attached to Appellant's complaint) is completely upfront about this; it includes a reference to § 790.115 and warns that students "will be subject to arrest and/or discipline in accordance with Florida State Statute and the Student Conduct Code." Furthermore, UNF's brief minces no words. One of its headings makes clear that its policy "simply trigger[s] a crime already defined by the Legislature." It goes on to defend what the panel's question assumes away: that UNF can trigger § 790.115-based criminal penalties against students who violate its policy. Here, once again, I cannot see how even an affirmative answer to the panel's constitutional question about a noncriminal policy matters to the analysis of UNF's very different, felony-triggering policy. It simply makes no difference for purposes of deciding this case whether, constitutionally speaking, UNF could enforce some different policy that attaches only noncriminal penalties.[34]

The third problem with the panel's question and the dissent's analysis is that article IX, section 7 of the Florida Constitution, speaks only to the powers of the

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[34] Furthermore, in the absence of a policy in this record attaching merely academic, noncriminal penalties, the tipsy coachmen doctrine is unavailable to the dissent as a means to affirm because: "[t]he tipsy coachman doctrine allows appellate courts to consider grounds for affirmance *if the record supports doing so*; it does not compel them to overlook deficient records and blaze new trails that even the tipsiest of coachmen could not have traversed." Powell v. State, 120 So. 3d 577, 591 (Fla. 1st DCA 2013), on reh'g (Aug. 1, 2013) (emphasis added).

universities' board of governors (BOG) (in paragraph (d)) and the powers of the individual university boards of trustees (in paragraph (c)). But as Judge Wetherell's and Judge Swanson's opinions note, the policy at issue in this case was not adopted by the BOG or by a board of trustees; it was adopted unilaterally by UNF's administrative staff. Thus, even if the dissent is correct that the BOG has constitutional authority to adopt freestanding policies superseding state laws, that principle would not apply here because UNF's policy was not adopted by the BOG or pursuant to any specific delegation of authority to UNF's staff. Accordingly, unlike the majority opinion, I see no reason to address the merits of the dissent's argument about the scope of the BOG's constitutional authority under article IX, section 7, because that issue is simply not implicated here.[35]

Finally, it bears mentioning that if UNF's policy were affirmed constitutionally, but not statutorily, as the dissent would have it, the policy *really* would not survive at all. What I mean is, once stripped of its law-based impetus, its repeated references to various laws, and its requirement that it remain consistent with law, there would be virtually nothing left of UNF Policy 14.0080P. Read it again and see; the text of UNF's policy is so intertwined with § 790.115 that it

[35] The same is true for the dissent's suggestion that § 1001.706(7)(b) provides statutory authority for UNF's policy. That provision is not an independent grant of authority to university staff; it simply directs the BOG to establish guidelines for boards of trustees regarding the use of university property, including "restrictions on . . . firearms . . . ." But UNF's policy is not a restriction imposed by its board of trustees pursuant to guidelines established by the BOG.

would be eviscerated and require redrafting. And then, presumably, its redrafting effort would have to resolve how not to "conflict with provisions contained in laws" (as required by UNF Policy 1.0010P, see supra note 2), including § 790.115(2)(a)3's express endorsement of the right of adults to store a securely encased firearm in a vehicle.

In conclusion, the dissent's tipsy coachmen analysis drawn from the panel's ill-fitting constitutional question gives a thoroughly insufficient rationale for affirming the particular policy adopted by UNF's administrative staff. UNF is simply not enforcing the sort of policy that the panel asked the parties to address and that the dissent would have us affirm. And, by extension, the majority should have avoided a broad, constitutional rebuttal to the dissent's views, because that opinion is deficient for these other nonconstitutional reasons.

PADOVANO, J., dissenting.

The majority and concurring opinions offer a variety of reasons for striking down the University's regulation. These opinions pursue differing legal theories but they all arrive at the same conclusion: that a state university is powerless to prohibit students from bringing firearms to school. This remarkable conclusion is not supported in the law and, with due respect for my colleagues, I believe that it defies common sense. For these reasons, I respectfully dissent.

State universities have independent constitutional authority to adopt rules and regulations governing the conduct of their students. Because the regulation at issue in this case falls directly within the scope of that authority, it is not subject to legislative preemption. Although we may disagree with the legal analysis in the trial court's order, the decision we have for review on appeal is nonetheless correct and it should be affirmed.

The trial court upheld the regulation on the ground that it was authorized by section 790.115(2)(a)3, Florida Statutes, (2011), and the majority has explained in some detail why it believes that the trial court's analysis was incorrect. However, it is not necessary to address the applicability of section 790.115(2)(a)3 in order to determine whether the regulation is valid, because that section pertains to potential violations of the criminal laws. Whether a university has the power to effectively make it a crime to keep a firearm in a parked vehicle by invoking the waiver

provision in the statute is a question that is not before the court at present. The plaintiff was not arrested or charged with a crime. If the state attorney decides to charge a student with possession of a firearm in a vehicle on the basis of the university's attempt to waive the exception in subdivision (2)(a)3, the courts will have to decide whether the waiver is valid. All that is at issue in this case is the validity of a policy regulating the conduct of university students.

The majority opinion focuses on the trial judge's legal analysis, but an error in the analysis does not necessarily warrant reversal of the order under review. We are here to review the correctness of the decision, not the validity of the reasons given for the decision. It is an established principle, often referred to as the "tipsy coachman" rule, that a decision by a trial court must be affirmed if it is correct for any reason that is supported by the record. See Robertson v. State, 829 So. 2d 901 (Fla. 2002); Dade County School Board v. Radio Station WQBA, 731 So. 2d 638 (Fla. 1999). The tipsy coachman rule does not merely allow an appellate court to consider an alternative argument that is supported by the record on appeal, it requires the court to consider such an argument.

As the Florida Supreme Court explained in Radio Station WQBA, the decision of the trial court "will be upheld" if there is any basis that would support the judgment in the record. Id. 731 So. 2d at 644. The rule that an appellate court is required, and not merely allowed, to affirm if there is an alternative ground to do

so is illustrated by the decision in Shands Teaching Hospital and Clinics, Inc. v. Mercury Insurance Co. of Florida, 97 So. 3d 204 (Fla. 2012). In that case, the Florida Supreme Court reversed a decision by this court for failing to affirm a trial court decision on a valid alternative legal ground. See Shands, 97 So. 3d at 212.

The order under review in the present case should be affirmed on the ground that the university had independent constitutional authority to adopt the regulation. This issue was raised by the court and addressed by the parties in oral argument and in supplemental briefs filed after the argument. Because the constitutional authority to adopt the regulation presents a pure issue of law, it is an issue that is not foreclosed by the record, as was the case in Robertson. Here, the trial court upheld the regulation in a summary judgment. The court concluded that there were no disputed issues of fact and that the university was entitled to a judgment as a matter of law. That decision was ultimately correct.

The governing power of a state university is derived directly from the Florida Constitution. Article IX, section 7(d) of the Florida Constitution provides that the Board of Governors shall "operate, regulate, control, and be fully responsible for the management of the whole university system," and section 7(c) states that each university within the system shall be operated by a Board of Trustees under "powers and duties" granted by the Board of Governors.

Because the power vested in state universities "flows directly from the Florida Constitution," it is self-executing. NAACP, Inc. v. Florida Bd. of Regents, 876 So. 2d 636, 640 (Fla. 1st DCA 2004). So long as the university is acting within the scope of its constitutional authority, it need not obtain a grant of legislative authority to adopt a rule. In this regard, the governing power of a state university is unlike that of a state administrative agency.

The Administrative Procedure Act provides that a state agency may adopt a rule only as authorized by the Florida Legislature. See §120.536, Fla. Stat. (2011). An agency has no legislative power of its own and is therefore dependent on the legislative branch of the government for a delegation of power. In contrast, a state university has independent constitutional authority. This distinction is recognized in section 120.52(1), Florida Statutes, (2011), which defines an agency as officers or entities "acting pursuant to powers other than those derived from the constitution." As we have previously explained, "[t]he significance of this limitation is clear: when an officer or agency is exercising power derived from the constitution, the resulting decision is not one that is made by an agency as defined in the Administrative Procedure Act." Decker v. University of West Florida, 85 So. 3d 571, 573 (Fla. 1st DCA 2012).

The governing power of a state university is also unlike the governing power of a city or county in that a university can exercise legislative power, albeit in a

limited way, without legislative oversight. The Florida Constitution grants counties the power to enact ordinances but limits that power by providing that a county may adopt only those ordinances that are "not inconsistent with general or special law." Art. VIII, §§ 1(f) & 1(g), Fla. Const. (1968). Likewise, the Florida Constitution provides that a municipality may exercise governmental power, "except as otherwise provided by law." Art. VIII, § 2(b), Fla. Const. (1968). In contrast, there is no comparable provision in Article IX that would effectively subordinate the rulemaking authority of a university to the Legislature's power to enact a general law. It follows from the absence of such a limitation in Article IX that legislative enactments do not invariably trump administrative regulations adopted by state universities.

There is one restriction stated in Article IX, but it deals exclusively with funding, not with the power to adopt policies or regulations. Section 7(d) provides that the power of the Board of Governors of the state university system "shall be subject to the powers of the legislature to appropriate for the expenditure of funds, and the board shall account for such expenditures as provided by law." As we explained in Graham v. Haridopolos, 75 So. 3d 315, 318 (Fla. 1st DCA 2011), approved, 108 So. 3d 597 (Fla. 2013), this provision effectively reserves the "power of the purse" to the Legislature. In that case, we rejected an argument that Article IX, section 7(d) vests exclusive power in the universities to set tuition rates.

However, we were careful to distinguish our earlier decision in NAACP v. Florida Board of Regents on the ground that it dealt with an issue not limited by section 7(d) - the authority to adopt regulations.

Section 14.0080P of the policies and regulations of the University of North Florida prohibits a student from keeping a firearm in a vehicle parked on university property. This regulation was adopted pursuant to authority granted to the university by the Board of Governors under Article IX, section 7. The board empowered each state university to "promulgate university regulations" and required each of them to "be responsible for campus safety and emergency preparedness, to include safety and security measures for university personnel, students, and campus visitors." See BOG Rules 1.001(3)(j) and (l). As provided in Section 5.0010R(J) of the Student Conduct Code of the University of North Florida, the possession of a firearm in a vehicle on campus in violation of section 14.0080P could subject the student to a variety of administrative penalties, including a reprimand, probation, suspension or expulsion.

The subject matter of section 14.0080P falls squarely within the scope of the university's rulemaking power. It pertains exclusively to the conduct of students enrolled in the university and it applies only on university property. It prohibits conduct that may be lawful in another context, but that is the case with many other university regulations. No one would doubt that a university has the power to

prohibit a student from smoking in a dormitory or drinking an alcoholic beverage on campus even though smoking and drinking may be perfectly lawful in other circumstances. Nor would anyone doubt that a university professor has the power to stop a student from delivering an uninvited religious speech in the middle of a class even though the student would have a First Amendment right to make the same speech at another time and in another place. See Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) (distinguishing the expression of an unpopular idea on school grounds, which is permitted, from disruptive speech on school grounds, which is not). The regulation in this case is no different. It is merely intended to maintain a sense of order and security within the university.

I believe that the University of North Florida had not only a right, but also a duty to adopt regulations such as the one before the court. It is fair to assume that most parents expect state universities to take reasonable precautions to ensure the safety of their daughters and sons while they are in school. This regulation was plainly designed as a safety measure. Whether it succeeds in that goal is, of course, debatable. Some would argue that the best way to keep students safe on campus is to allow them to be armed, while others would argue that the best way to ensure their safety is to prohibit guns on campus. But the debate on the merits of the policy is beside the point. We are dealing here only with the authority to adopt

the regulation, not the wisdom of the regulation. If the university concludes that the best way to protect students is to prohibit guns on campus, it is not for the Legislature or the courts to interfere with that judgment.

The majority acknowledges the fact that state universities have independent constitutional authority but concludes that the regulation at issue does not fall within the scope of that authority. The problem with this argument is that it is refuted by the plain language of the constitutional provision at issue. Article IX, section 7(d) states that the "board [of governors] shall operate, regulate, control, and be fully responsible for the management of the whole university system." This language creates a broad governing power that goes well beyond academic issues. The terms "operate," "regulate" and "control" clearly signify that the universities also have authority to adopt campus safety regulations. There is no exception or limitation in Article IX, section 7 for safety regulations pertaining to firearms. Nor is there any exception that would put a particular part of a university campus beyond the university's control. Because the governing power created by Article IX, section 7 applies to the "whole university system," it necessarily applies to a university-owned parking lot.

The majority asserts that the Florida Legislature enjoys a form of "primacy" on the subject of gun safety laws. On this point the majority relies on Article I, section 8(a), of the Florida Constitution which 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." The majority then cites Grapeland Heights Civic Ass'n v. City of Miami, 267 So. 2d 321, 324 (Fla. 1972), as authority for the proposition that the term "law" in Article I, section 8(a), refers exclusively to a law enacted by the Legislature. That is generally correct, but the principle does not operate to preclude the localized university firearms regulations, as the majority suggests.

Article I, section 8(a) states that the manner of bearing arms "may" be regulated by the Legislature. It does not state that the manner of bearing arms "may only" be regulated by the Legislature or that it "shall" be regulated by the Legislature. Moreover, Article IX, section 7 was approved by the people of Florida long after the adoption of Article I, section 8(a). If the people intended to limit the power they were granting to universities in Article IX, section 7 by providing that university firearms regulations must be subordinate to state firearms laws, they could have easily done that. Article IX, section 7 does not mention Article I, section 8(a), much less suggest that it creates a kind of legislative primacy with respect to gun safety regulations.

In any event, section 14.0080P does not "regulate" firearms in the way the term is used in Article I, section 8(a). It does not purport to impair a citizen's constitutional right to bear arms. Nor does it limit the constitutional rights of

students attending the university. Although the regulation prohibits guns on university property, it does not forbid a student from owning a gun or possessing it off campus. A state university obviously has no power to enact civil or criminal laws that regulate the rights of citizens to keep and bear arms, but I think it is a far different matter to conclude that a regulation that purports to govern the students on campus is invalid because it happens to deal with firearms. The university has exclusive authority under Article IX, section 7(d) to regulate the conduct of students on campus and it seems to me that this authority implicitly includes the right to prohibit a student from bringing a gun to school.

In my view, the fallacy of the majority's argument on this point is that it treats a condition on the exercise of a privilege as though it were the same as a restriction on a constitutional right. The owner of a home may prohibit a visitor from bringing a firearm into his or her home. A restriction such as this would not be a violation of the visitor's rights, even though the visitor has a constitutional right to possess a firearm in other places. For the same reason, a hospital could adopt a policy of prohibiting the possession of firearms in the waiting area of its emergency room. A restriction such as that would not violate the rights of persons who are at the hospital, even though they plainly have a right to possess firearms in other places. The same logic applies here. Attendance at a university is not a right. The rules and regulations that apply as a condition of enrollment in a

particular university cannot be fairly equated with laws that operate as general restrictions on the rights of all citizens.

The majority reasons that the regulation is invalid, regardless of the source of authority for adopting it, because section 790.33(1), Florida Statutes, (2011) preempts all laws and regulations pertaining to firearms. This conclusion assumes that the constitutional power vested in the Legislature is invariably superior to the constitutional power vested in state universities. I do not believe that assumption is correct. The subject matter of the controversy before the court in this case pertains exclusively to the governance of a state university. To say that this field is nonetheless preempted by the Legislature is to elevate legislative power to a level not intended by the people of this state (perhaps not intended by the Legislature itself) and to diminish the constitutional authority the people intended to vest in the universities.

The task before us is not to decide whether one governmental entity holds a more important constitutional position than another. Rather, we must determine the nature of the governmental function that is the subject of a controversy and to properly classify it within the powers that belong to a particular governmental entity. For example, a university has no power to adopt a regulation that would interfere with the method of appropriating funds for the general revenue of the state, because that is a function of the Legislature. See Art. III, §§12, 19, Fla.

Const. (1968). Likewise, a university has no power to regulate the conduct of citizens at large. The power to enact general and special laws is a power that is vested exclusively in the Legislature. See Art. III, §6, Fla. Const. (1968).

In contrast, the regulation at issue in this case is one that falls exclusively within the power vested in state universities. Whether a university student should be entitled to park on campus and, if so under what conditions is a matter for the university, not the Legislature. I do not mean to suggest that the Legislature attempted to interfere with the judgment of the university on this point. In fact, it appears to me that the Legislature recognized that it should defer to state universities on issues such as these. Section 1001.706(7)(b), Florida Statutes (2011), provides in material part that the Board of Governors has authority to restrict the use of "firearms, food, tobacco, [and] alcoholic beverages" on university property (emphasis added).

In addition to the majority opinion, there are five concurring opinions. These opinions offer a variety of reasons for striking down the university's regulation but, significantly, no judge of this court has argued that the regulation violates a student's right to bear arms as guaranteed by the Second Amendment of the United States Constitution and Article I, section 8 of the Florida Constitution. During the oral argument, counsel for the plaintiffs stated that this issue was not before the court. Yet, in both the initial brief and in the supplemental briefs,

counsel for the plaintiffs made this argument at least obliquely. Although the court is not deciding at this point whether the regulation violates the constitutional right to bear arms, it is worth noting that this right is not absolute. As Justice Scalia has explained:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. (citations omitted) For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. (citations omitted) Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

District of Columbia v. Heller, 554 U.S. 570, 626-27 (2008) (emphasis added).

I am concerned not only about the error I believe the court has made in this case as it pertains to students at the University of North Florida, but also about the effect the error will have on many other college students in Florida. Section 14.0080P of the policies and regulations adopted by the University of North Florida is not unique. Identical regulations exist at the University of Florida, Florida State University and the University of South Florida.[36] The effect of the

[36] See University of Florida Regulation 2.001; Florida State University Policy OP-

court's decision is to nullify the constitutional authority vested in at least four of the state's largest universities and the consequence of the decision is to deny more than a 100,000 college students an important safety precaution these universities intended to provide.

For these reasons, I believe that the trial judge was correct in denying injunctive relief and in dismissing the plaintiffs' complaint. The regulation prohibiting a student from possessing a firearm in a vehicle parked on campus is a valid exercise of authority granted to the university under the Florida Constitution and is not preempted by state law.

C-14; University of South Florida Policy USF4.0010(7)(c) and 6-009; USF Handbook, sec. 4.04 at http://www.sa.usf.edu/dean/docs/USF_handbook.pdf.