DISTRICT COURT OF APPEALS, FIRST DISTRICT

DCA CASE NO.: 1D12-2174
L.T. CASE No. : 16-2011-CA-008012

FLORIDA CARRY, INC., and
ALEXANDRIA LAINEZ

Appellants/ Plaintiffs,

v.

UNIVERSITY OF NORTH FLORIDA,
JOHN DELANEY.

Appellees/ Defendants.
_____/

**Appeal from the Circuit Court,
Fourth Judicial Circuit, in and for
Duval County, Florida**

APPELLANTS' SUPPLEMENTAL BRIEF

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Introduction

This case was heard for oral argument by the Court on March 19, 2013. Prior to the oral argument the court provided three additional questions to counsel for each party, and ordered that counsel be prepared to address the issues raised by the Court in addition to the briefed arguments. Subsequent to the oral argument the Court authorized each side to file a supplemental brief directed to the additional issues.

Summary of Argument

The legislature's power, to preempt regulation of firearms by any other agency or subdivision of the state was not affected by the constitutional creation of the Board of Governors. The authority to regulate the use and possession of firearms is limited to those bodies with law making authority. While the Board of Governors may have the authority to pass rules and regulations for the general administration of the state university system, that does not include the power to pass laws, and therefore does not include the authority to regulate firearms except as specifically provided for by the Legislature.

The Legislature has granted Appellees limited authority to create rules for possession on campus, but did not extend the Appellees' authority into students' private vehicles.

There is no support for Appellees' argument that their unauthorized rules and regulations attacked in this action are statutorily authorized. The Florida Legislature has the ultimate authority to determine the laws of the State of Florida and has determined that a person should be allowed to carry a weapon or a firearm securely encased in their vehicle, and that doing so should not be a crime, including when driving onto a university campus. The legislature has not granted any affirmative authority to universities such as Appellee UNF to publish a waiver of the secure encasement provisions of Sec. 790.115, Fla. Stat., as claimed in Appellees' Student Handbook.

There is no credible argument that the Appellee's do not come within the wording of Sec. 790.33, Fla. Stat. and no argument was made either in the Appellees' brief or at oral argument to the contrary. At no time have Appellees ever claimed that they are not a entity of the state and a state employee, nor have they claimed that their illegal rules are not rules or regulations within the meaning of Sec. 790.33, and no such claim should be heard now.

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?**

Article I, Section 8 of the Florida Constitution's Declaration of rights 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." This is a clear grant of authority to the legislature, the only law making body in Florida. Art. III, Sec. 1, Fla. Const.[1] Only the Legislature may regulate the time place and manner of the bearing of arms, within the limits of the Florida and U.S. Constitutions. The Court's question asks whether the general constitutional authority of the Board of Governors to "operate, regulate, control, and be fully responsible for the management of the whole university system"constitutes authority to adopt noncriminal policies or

[1] "The legislative power of the state shall be vested in a legislature of the State of Florida." Art. III, Sec. 1, Fla. Const. Blacks Law Dictionary defines legislative power as " the authority of a branch of government that is charged with making and enacting laws."

regulations regarding firearms. The answer is simply, No.

While the record contains no evidence that the Board of Governors has delegated any authority to the boards of trustees of the various universities to regulate the possession of securely encased firearms in vehicles, such a delegation of authority would not pass constitutional muster. No entity may grant to another authority it does itself possess. Deprivation of such fundamental rights as the right to bear arms in defense of oneself, explicitly protected by the Declaration of Rights, cannot be at the whim of a state agency's appointed official, trustee, or even a constitutionally created board of university governors.

Under Florida's Declaration of Rights, from the first draft of the Florida Constitution until now the free citizens of Florida have always had the right to keep and bear arms.[2] The Court's question raises the issue of whether the recent constitutional amendment creating the Board of Governors conflicts with the provisions of Art. I Sec. 8, Fla. Const., and if so which is superior.

If this case were a conflict between constitutional provisions, the fundamental rights protected by the Declaration of Rights would be superior to the constitutional authority granted to an administrative board of the state. However,

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[2] This does not include the constitution of the military government of Florida of 1865-1868.

no such conflict exists. Art. 1 Sec. 8 clearly states that "the manner of bearing arms may be regulated by **law**." This is not a grant of authority to an appointed board or non-elected trustees of a university for the making of an administrative rule or the setting of policy on firearms. Only a law, duly enacted the legislature which is directly accountable to the people, is permissible under our constitution to regulate any manner of bearing arms. Article I, Section 2, of the Florida Constitution further guarantees the right to defend life and protect property, the very ideals at the core of Article I, Section 8 and the Second Amendment to the United States Constitution.

This court does not need to reach a determination as to the applicable of constitutional scrutiny or research the state's level of interest in UNF's policies in this case because the Board of Governors, and its designee UNF, are without legislative authority to regulate the keeping and bearing of arms. Within its police powers, and its specific constitutional authority as both the law making branch of government and the only entity with the right to regulate the manner of bearing arms, the legislature has:

1. Completely preempted the field of regulation of firearms and ammunition, Sec. 790.33, Fla. Stat.;
2. Declared that they may be kept lawfully in a student or visitor's

vehicle, Sec. 790.25(5), Fla. Stat.;

3. Preempted regulation of all other weapons possessed pursuant to the terms of a concealed carry license, Sec. 790.06(15), Fla. Stat.;

4. Generally prohibited their concealed carry on the person "into… any college or university facility," Sec. 790.06(12), Fla. Stat; and

5. Determined that the safety of the citizens of Florida and visitors is enhanced by the possession of securely encased firearms in vehicles. Sec. 790.25, Fla. Stat.; See also *Florida Retail Federation, Inc. v. Attorney General of Florida*, 576 F.Supp.2d 1281, 1289 (N.D. Fla. 2008)(finding that the legislature has determined that safety is enhanced not endangered by lawfully possessed firearms); and *Moore v. Thompson*, 126 So. 2d 543 (Fla. 1961)(stating the general rule is that findings of fact made by the legislature are presumptively correct).

To the extent the Court does choose to engage in a constitutional analysis of the right to bear arms, it is settled law in Florida that "[A right] is, as a part of the state constitution's declaration of rights, a fundamental right." *Hillsborough County Governmental Employees Ass'n v. Hillsborough County Aviation Auth.*, 522 So.2d 358, 362 (Fla. 1988). The right to bear arms is also fundamental under

the US Constitution. *McDonald v. City of Chicago* 130 S. Ct. 3020, 3042 (2010). It is also clear that where fundamental rights are abridged, Florida courts have always applied a strict-scrutiny standard.[3] Here the abridgment of the right to keep arms in a private vehicle, by an unelected board of governors or trustees, and Appellee Delaney, cannot survive any permissible level of scrutiny much less the strict scrutiny required when abridging a fundamental right.

As a fundamental right, the right to bear arms is "subject to official abridgement only upon a showing of a compelling state interest." *Hillsborough County* at 362(referring to the right to collectively bargain as guaranteed in the Declaration of Rights). . Because the Board of Governors has no law making authority, any attempt to regulate the manner, or place bearing or keeping arms by a designee of the Board of Governors would be subject to strict scrutiny. See *State v. Florida Police Benev. Ass'n*, 613 So. 2d 415, footnote 6 (Fla. 1992)(holding that if a legislatively mandated change fell outside the appropriations power, it would constitute an abridgment of the right to bargain and would therefore be subject to the compelling state interest test of strict scrutiny).

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[3]While the federal courts continue to struggle with the appropriate level of scrutiny and the Supreme Court has yet to provide a definitive answer, Florida courts have made no distinction between the fundamental rights in the Declaration of Rights. See generally, *Hillsborough County Governmental Employees Ass'n*.

The application of strict scrutiny to any administrative enactments by the Board of Governors would also be subject to findings of fact and declarations of policy by the legislature. *Moore v. Thompson*, 126 So. 2d 543 (Fla. 1961). The Legislature has found:

> 1. As a matter of public policy and fact that it is necessary to promote firearms safety and to curb and prevent the use of firearms and other weapons in crime and by incompetent persons without prohibiting the lawful use in defense of life, home, and property, and the use by United States or state military organizations, and as otherwise now authorized by law, including the right to use and own firearms for target practice and marksmanship on target practice ranges or other lawful places, and lawful hunting and other lawful purposes. Sec. 790.25(1), Fla. Stat.
>
> 2. It is further the intent of this section to deter and prevent the violation of this section and the violation of rights protected under the constitution and laws of this state related to firearms, ammunition, or components thereof, by the abuse of official authority that occurs when enactments are passed in violation of state law or under color of local or state authority. Sec. 790.33(2)(b), Fla. Stat.

The Legislature, based on its statements of policy and intent, had a compelling governmental interest both in allowing citizens to carry in locations where the Legislature felt it was necessary and proper and in uniform firearms laws, and to encourage the lawful use of firearms without the risk of a patchwork of laws no citizen could reasonably be expected to know, such as those contained in university student handbooks.

Appellee's have no such compelling interest. There is no fundamental right for a property owner or manager to keep guns out of vehicles in parking lots. *Florida Retail Federation, Inc.* at 1288. There is however a fundamental right to bear arms, and the Legislature has included within that right the possession of a securely encased firearm in a vehicle. Sec. 790.25, Fla. Stat.

At oral argument, Appellees raised the issue of Sec. 1001.706, Fla. Stat. This was an admission by Appellees that at least to some extent, the legislature gave Appellees limited authority to regulate firearms after the 2002 creation of Article IX, Sec. 7. This should be seen for what it is. A recognition by the Appellees, the Board of Governors and the Legislature that the right to regulate firearms remained with the Legislature even after the creation of the Board of Governors. As discussed at oral argument this limited authority only allows the Appellee's to regulate rules for possession of firearms on campus within those circumstances allowed under Sec. 790.115, Fla. Stat., for activities related to firearms and training, but not to possession in a vehicle which the Legislature specifically addressed and retained to itself. Secs. 790.33, 790.115 and 790.25, Fla. Stat.

In its question the Court cites to decisions in two cases, one by this Court and one by the Florida Supreme Court. This case is distinguishable from *NAACP,*

Inc. v. Florida Board of Regents, 876 So. 2d 636 (Fla. 1st DCA 2004). First, nothing in the explicit language or the constitutional provision creating the authority of the Board of Governors, or the intent of the framers and voters, indicates a grant of authority to impair the fundamental rights of students while outside the classroom and in their private vehicles. Nothing in Article IX, Section 7 authorizes the Board of Governors to regulate by law the time place and manner of bearing arms. Second, the Appellees' policies at issue in this case have no bearing on the learning environment or the operation of the universities of Florida, only the parental desire of the Appellee to control what adult students may possess in their car, despite any determinations or findings of the Legislature. If the Board of Governors may administratively ban firearms from cars on campus based on their constitutional authority to "operate, regulate, control, and be fully responsible for the management of the whole university system" presumably they would also have the authority to prohibit the presence of a Bible, Torah, or Quran in a student's glove box. A firearm is as equally protected as free speech under Florida's Constitution and law from infringement by the Board of Governors. *McDonald* at 3043(equating the Second Amendment to the First Amendment, and rejecting any idea of singling out the Second Amendment for unfavorable treatment).

As to the *Haridopolos*, case the above analysis and *Haridopolos* reinforce Appellants' position. *Haridopolos* involved a challenge to Secs. 1011.41 and 1011.4106, Fla. Stats., which were passed by public law 2007-217. This same public law created Sec. 1001.706, Fla. Stat., which was raised by Appellees for the first time the day before oral argument. However, when the Board of Governors, challenged Secs. 1011.41 and 1011.4106, Fla. Stat., no challenge was brought against Sec. 1001.706, Fla. Stat.[4]

The *Haridopolos* court went on to explain the meaning of "operate, regulate, control, and be fully responsible for the management of the whole university system." The court there explained that this included those responsibilities that were executive and administrative in nature. *Haridopolos* at 20. There is no correlation between administering the university system to avoid duplication of services and education of students, and Appellees desire to regulate what students have in their personal vehicles, whether an objectionable book, or a firearm specifically authorized by the Legislature. Furthermore, because the Legislature has expanded castle doctrine protection to individuals in vehicles, to allow the university to regulate firearms in vehicles would impair the Legislature's

[4] Board of Governors filed a voluntary dismissal prior to the Supreme Court's ruling.

recognition of a person's vehicle as an extension of their castle. Sec. 776.013, Fla. Stat. Ignoring the Legislatures determination of the extension of castle doctrine and the places where it applies, can in no way be included within the express powers or the type of powers granted to the Board of Governors.

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?

It appears, based on the quoted language that the Court is referring to the provisions of subsection (1) of Sec. 790.33 Fla. Stat. This subsection along with subsection (2)(a) was part of the original 1987 law intended to create full preemption of all firearms regulations state wide. When this language proved to be ineffective due to a lack of enforcement mechanism, and a general refusal to comply with the statute by subordinate governments, the legislature added subsections (2)(b) and (3). This action is primarily based on subsection (3) which is written even more broadly than the already expansive original statute, and provides for both prohibitions and penalties.

Appellants' position is that as a entity funded by tax dollars and employing state employees, Appellee UNF is unquestionably a unit of state government within the meaning of subsection (1), and a state actor, with its own police force

regulated under Chapter 943 Florida Statutes. Presumably, based on Appellees arguments in this case they could even create their own police force without being subject to the restrictions of the Florida Statutes regarding the certification of police officers and police departments, as well as ignoring all state building codes, health codes, fire codes, uniform traffic laws etc., under the guise of managing "their" property as a constitutionally created entity. Such a broad reading cannot be supported by the provisions of Article IX, Sec. 7. Such broad power in the hands of unelected state employees, is antithetical to the concept of ordered liberty, separation of powers and limitation of authority, that the right to bear arms was intended to guard against.

Additionally, the legislature made clear that it was preempting "all existing and future county, city, town, or municipal ordinances or any administrative regulations or rules." The inclusion of administrative rules casts a broad net that would include all forms and sub entities of state government. In fact the Florida Fish and Wildlife Conservation Commission (FFWCC), which is also a constitutionally created entity, modified its administrative regulation which prohibited possession of firearms on its various properties, to prohibit only the use of firearms for the taking of fish and game. Rule 68A-15.004-2(6)(a), F.A.C., and FFWCC Agenda Nov. 2011 Commission Meeting item 12(A)(1), Major Proposed

Rule Changes Hunting and Fishing, pg. 24, http://www.myfwc.com/media/1583174/12A1_Hunting-Fishing-Rules_ProposedRuleChanges_presentation.pdf .

In effect the FFWCC withdrew to its limited area of authority under the Florida Constitution and Florida law, something Appellees seem unwilling to do. Regardless of the correct answer to the Court's question as to the meaning of the terms in subsection (1), subsection (3)(a) clearly states that:

> Any person, county, agency, municipality, district, or other entity that violates the Legislature's occupation of the whole field of regulation of firearms and ammunition, as declared in subsection (1), by enacting or causing to be enforced any local ordinance or administrative rule or regulation impinging upon such exclusive occupation of the field shall be liable as set forth herein.

Sec. 790.33(3)(a).

While the original provisions of Section 790.33 may leave questions as to who exactly it applies to, there can be no such confusion with the enactment of the 2011 amendment quoted above. Appellees are persons and entities violating the Legislature's occupation of the whole field of firearms, pursuant to the Legislature's authority under Article I, Section 8.

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?

Publication of the student handbook constitutes a rule or regulation, under the apparent authority of a state actor. See Generally*, Due v. Florida Agricultural & Mechanical University*, 233 F. Supp. 396, (N.D. Fla. 1963)(requiring students to exhaust administrative remedies regarding suspension for violation of student code of conduct). Chapter 9 of the handbook which contains the language at issue here is entitled, "Student Rights and Regulations." As stated in response to question two, the more expansive provisions of subsections (2)(b) and (3) should be considered by the Court in determining whether the rules and policies of Appellees violate the provisions of Sec. 790.33, Fla. Stat.

The student handbook specifically states that its restrictions are based on Sec. 790.115, Fla. Stat.[5] It goes on to state that any student possessing any of the prohibited items (including firearms, or other weapons) on campus, will be subject to arrest and/or discipline in accordance with Florida Law and the Student Conduct Code. It also seeks to apply its terms to any "Student, resident, or commuter." While there is no definition of commuter, this could include those

[5]For the first time in this case, Appellees conceded at oral argument that they are not a school district within the meaning of Sec. 790.115, even though the rules at issue are specifically premised on the claimed authority of Sec. 790.115, Fla. Stat.

coming onto campus from the community, with no intent of exercising parking privileges, merely crossing campus, or dropping off a student.

The challenged provisions in Appellees' student handbook are both rules and administrative regulations. As noted by the *NAACP* court, the Board of Governors and by extension Appellees are not subject to the Florida Administrative Procedures Act, so the failure to promulgate their rules through that system cannot be a basis to claim that the challenged provisions are not administrative regulation. *NAACP* at 640. This Court should find that the provisions of the student handbook are both rules and administrative regulations within the letter and spirit of Sec. 790.33, Fla. Stat.

Conclusion

Appellants again respectfully request this Court find that the Appellees are in violation of the Legislature's preemption of firearms regulation, order the entry of an immediate injunction against continued enforcement of Appellees' illegal rules, and remand this case for a determination of damages, attorney's fees and costs.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 12 day of April, 2013 by E-service or U.S. Mail, to the following:

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CERTIFICATE OF COMPLIANCE

I hereby certifying that this brief complies with the font requirements of Rule 9.210 Fla. R. App. P.

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