IN THE CIRCUIT COURT, FOR THE
FOURTH JUDICIAL CIRCUIT, IN AND
FOR DUVAL COUNTY, FLORIDA

CASE NO.: 2011-CA-08012
DIVISION: CV-G

FLORIDA CARRY, INC., and
ALEXANDRIA LAINEZ

Plaintiffs,

v.

UNIVERSITY OF NORTH FLORIDA,
JOHN DELANEY.

Defendants.
_____/


**MEMORANDUM OF LAW IN OPPOSITION TO**

**DEFENDANTS' MOTION TO DISMISS**

Comes now Plaintiffs, by and through their undersigned attorneys and file this memorandum of law in opposition to the Defendants' Motion to Dismiss. This memorandum also addresses the errors in the Order Denying Motion for Temporary Injunction that relate to the defenses raised in the motion to dismiss, which claim a statutory basis for Defendants' improper and illegal rules and regulations.

Defendants argue that they are entitled to dismissal because the complained of rules and regulations are specifically authorized by Sec. 790.115 and 790.251, Fla. Stat. This is simply incorrect. For the reasons that follow the Defendants' claim that their rules and regulations are authorized by statute must fail.

**Sec. 790.251, Fla. Stat. has been declared unconstitutional except as between employers and employees.**

This Court's order on the Motion for Temporary Injunction relied, at Defendants' urging, almost exclusively on Sec. 790.251, Fla. Stat. This statute, as pointed out by Plaintiffs at the hearing on the Motion for Temporary Injunction, was declared unconstitutional shortly after its passage, to the extent it applied to any relationship other than the employer-employee relationship. *Florida Retail Federation Inc. v. Atty. Gen. of Florida*, 576 F.Supp.2d 1281 (2008) and 576 F. Supp.2d 1301 (2008). The Plaintiffs' complaint does not seek to abrogate the effect of Sec. 790.251, Fla. Stat. as it applies to the employer-employee relationship between Defendants and their employees, but only as to students and other guests, lawfully present on the campus of UNF.

**Sec. 790.251, Fla. Stat., is a civil statute, while 790.115 Fla. Stat., is a criminal statute.**

Sec. 790.251, never mentions any penal punishment for the possession of a firearm. It merely states, that in accordance with its legislative intent, an individual whose rights under the statute are violated by their employer, has a cause of action against the employer for civil damages, much as Sec. 790.33, Fla. Stat., the statute being enforced by this action does for individual who sue governmental entities for violation of the preemption provisions.

Sec 790.115, is a criminal statute. It provides that possession of a firearm on a

school campus, including Defendants' is a felony, unless a person possess a concealed carry permit, in which case the possession of the firearm is a misdemeanor. It then makes a specific exception for those persons carrying a securely encased firearm in a private conveyance, in accordance with Sec. 790.25, Fla. Stat, as Plaintiffs' Complaint sets forth they wish to do. The next part of the statute allows "school districts" but not individual schools or any other entity, to waive operation of the securely encased provision, but not for all cars on campus. It only allows the waiver of the securely encased provision for purposes of student and campus parking privileges. See *Thompson v. State*, FLW Supp. 1805THOM; 18 Fla. L. Weekly Supp. 461a.(holding that the provision allowing for waiver of the securely encased provision of Sec. 790.115, Fla. Stat., did not apply to a parent picking up their child, and that such a reading would lead to an absurd result when read in part with the declaration of policy and legislative intent and construction contained in the referenced statute of Sec. 790.25. Fla. Stat.)

**Sec 790.251, Fla. Stat. does not grant a business any substantive right to ban firearms from its premises, but is a protection for individuals, which authorizes civil suits against businesses.**

The Court's Order Denying Motion for Temporary Injunction misapprehends the purpose of Sec. 790.251, Fla. Stat. Nowhere does Sec. 790.251 authorize UNF or any other individual school to ban firearms from school property, nor does any statute indicate an intent to do so. Sec. 790.251 as set forth above and in its Legislative intents and findings, never indicates such an intent and in fact indicates that any

restriction should be read in a very limited manner. The clear intent of the statute was for a very specific reason, to prevent discrimination against holders of Concealed Weapon Firearms Licenses, and to protect the rights of employees and other guests of businesses to have a privacy interest in the content of their vehicles in regards to the storage of firearms.

> **(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.

§ 790.251, Fla. Stat. Ann.

The only reference to schools in the entire statute is that schools, as defined in chapter Sec. 790.115, (which would include Defendant UNF) are not prohibited, by the terms of Sec. 790.251, from engaging in conduct prohibited to other employers, but nor does the statute authorize schools to do anything specific regarding the regulation of firearms in vehicles. That is left to the provisions of other statutes, such as Sec. 790.115

**The Legislative intent of Sec. 790.251 is irrelevant to the legislative intent of Sec. 790.115, which was passed 16 years earlier, and legislative intent cannot be divined from the statement of an individual legislator.**

Defendants relied heavily on legislative history in the prior hearing in this case, arguing that the Court should consider the statements of three individual senators, two of whom ultimately voted against the bill, and one who sponsored the bill to divine the intent of Sec. 790.251. However, "floor debates reflect at best the understanding of individual Congressmen." *Zuber v. Allen,* 396 US 168 (1969). There is also no need to rely on analysis of legislative intent when the plain language of the statute is clear.

The Defendants argue that the floor debate on Sec. 790.251 should somehow inform or influence the Court to delete a word from Sec. 790.115, specifically the word district, form the term "school district" and rule that because the quoted legislators determined that the term "school" as defined in Sec. 790.251 and Sec. 790.115, applied to Defendant UNF, the Court should hold that Defendant UNF was also within the term "school district" in Sec. 790.115,

Floor debate over 790.251 in 2008, referring to the provisions of 790.115, is not authoritative of 790.115's intent as enacted by other legislators 16 years earlier. Further, the Court's findings of legislative intent directly conflict with 790.251's expressed legislative intent and findings. See 790.251(3) as quoted previously. There is absolutely no support for Defendants' argument that individual legislation's opinions regarding a statute under consideration can bear in any way upon a statute passed 16 years prior.

**Defendant regulations are specifically premised on Sec. 790.115, Fla Stat.**

At no time, prior to this litigation, did the Defendant's claim a right to prohibit firearms from campus pursuant to Sec. 790.251. The only statute cited in the student handbook or code of conduct as Defendant's authority to ban firearms from campus is Sec. 790.115 (Student Handbook Page 51). This is because Defendants are well aware that while 790.115 does grant authority to school districts to publish a waiver, no school or business is granted affirmative rights under Sec. 790.251, Fla. Stat.

Additionally, Defendants regulation in its student handbook specifically states that a student violating the rule will be subject to arrest. Since Sec. 790.251 does not create any crimes and a violation of a rule pursuant to Sec 790.251 would not constitute a basis for arrest, the only basis for the Defendants' regulation is the statute it cites in the regulation itself.

**Sec 790.25 Fla. Stat. is superior over any conflicting statute and the clearly stated legislative purpose and construction of Sec. 790.25 shows that any question regarding conflicts between the various statutes should be construed in favor of the right to keep and bear arms as provided for by the legislature.**

Defendants' claim that they have statutory authority under Sec. 790.115 also fails. Sec. 790.115, specifically authorizes individuals to carry securely encased firearms in their vehicle, pursuant to Sec. 790.25 Fla. Stat., unless they are seeking to park on the campus of a school, for which the governing school district has waived the operation of that portion of Sec. 790.115, and only to the extent the person is exercising

student or campus parking privilege.

Sec. 790.25, which is specifically referenced by Sec. 790.115 is the statute controlling the legislatively recognized right to keep a firearm or weapon securely encased. It expressly provides that Sec. 790.25 is superior to all other statutes in conflict and the statute in general shall be liberally construed to carry out the legislature's intent and that carry securely encased in a vehicle specifically, shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons.

> (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.
>
> (5) POSSESSION IN PRIVATE CONVEYANCE.—Notwithstanding subsection (2), it is lawful and is not a violation of s. 790.01 for a person 18 years of age or older to possess a concealed firearm or other weapon for self-defense or other lawful purpose within the interior of a private conveyance, without a license, if the firearm or other weapon is securely encased or is otherwise not readily accessible for immediate use. Nothing herein contained prohibits the carrying of a legal firearm other than a handgun anywhere in a private conveyance when such firearm is being carried for a lawful use. Nothing herein contained shall be construed to authorize the carrying of a concealed firearm or other weapon on the person. *This subsection shall be liberally construed in favor of the lawful use, ownership, and possession of firearms and other weapons*, including lawful self-defense as provided in s. 776.012. (emphasis added)

Sec. 790.25, Fla. Stat.

**The Court cannot ignore the plain language of the statute and the fact that a "school district" is a defined legal entity existing under the constitution and the laws of the State of Florida.**

This Court relied on Defendants' argument that the legislative intent and debate over Sec. 790.251 controls, to hold that the legislature meant all schools including post-secondary, when it defined schools for the purposes of Sec. 790.251. The Plaintiffs agree. The problem is that the Defendants are not being sued for violation of Sec. 790.251, they are being sued for violation of Sec. 790.33, Fla. Stat. Sec. 790.33 is clear that Defendants may not make a rule regarding firearms without specific statutory authority.

By their own statements Defendants enacted a rule pursuant to Sec. 790.115, Fla. Stat., which only authorizes school districts, not just any school, to make such a rule. There is no reason that Defendant has pointed to, for the legislature to use the term "school" throughout chapter 790, and to define the term, and to even list different types of schools, but then suddenly use a new term in Sec. 790.115, "school district", when according to Defendant's argument school district should include all schools. The only logical explanation for this is that the legislature intended to make a distinction between individual schools and school districts. See *Gen. Elec. v. DeCubas*, 504 So. 2d 1276, 1278 (Fla. 1st DCA 1986)(all word in the statue must be given effect, there are no superfluous words).

The Defendant argue that the term school district is not defined in chapter 790, and that the Court must therefore look to legislative intent to determine the meaning of

the term or whether there are extraneous words. In fact, the legislature did not define the term school district in chapter 790, because it did not need to. The term was already defined in both the Florida Constitution, Art. IX. Sec. 4, and in general law, Sec. 1001.30 and 1001.31, Fla. Stat. In fact Defendants argued in their memorandum of law that the Court should, rely on the definition in Sec. 1001.31, until Plaintiff's pointed out at a prior hearing that Defendants had only used the first part of the definition in their memorandum and that the complete definition would not include UNF unless it became subject to the direction of the local district school officials.

The Defendants now argue despite their previous misplaced reliance on Sec. 1001.31, that because the legislature failed to direct that one should look to the Florida Constitution or other chapters for the definition of the term "school district", the Court should not do so. This is directly contrary to well established rules of statutory construction as well as common sense. *State v. Fuchs*, 769 So.2d 1006 (2000).

*Fuchs* was a criminal case in which the defendant argued that the criminal statute he was prosecuted under was unclear because the legislature had not defined every term in the statute and had in fact specifically removed a provision in the statute that stated "as defined under the laws of Florida" during an amendment. Fuchs argued that because the legislature had specifically removed language stating that the terms in the statute would be defined under the laws of Florida, the court could not look to other chapters for definitions, and that the statute he was prosecuted under was therefore unconstitutionally vague.

The court rejected Fuchs argument and pointed out that it was well settled that in the absence of a statutory definition a court could rely on case law or related statutory

provisions. The court went on to point out previous cases where it had relied on constitutional definitions, and other statutory definitions from other chapters to define terms at issue in a case. The Court also stated that the failure of the legislature to direct where to look for definitions of terms did not prohibit the court from looking to other sources within the law or even industry custom.

In both the Florida Constitution and chapter 1001, the only places in Florida law where the term school district is defined by the legislature, the definition of what is a school district is consistent and clear, and does not include a university or post secondary school such as UNF. Somehow, the Defendants argue however, that the term school district means something completely different when used in chapter 790, rather than its defined meaning throughout the rest of Florida law:

The Defendants seek to avoid this logical conclusion by arguing that because the legislature included post-secondary schools in the list of exceptions for purposes of the prohibitions in Sec. 790.251, this Court should assume that the failure to include post-secondary schools as an authorized entity to publish a written waiver to secure encasement in Sec. 790.115 was a mere oversight by the legislature.

The approach argued by Defendants here is quite the opposite of the approach taken by the U.S. District Court in *Florida Retail Federation v. Attorney Gen. of Fl.*, 576 F. Supp. 2d 1281 (N.D. Fla. 2008)(ruling that 790.251 only applies to an employer's regulation of certain employees). Defendants' desire to rewrite Sec. 790.251, and its reliance on the legislative record to accomplish what Defendants claim was the law's intent, based on floor debate, was specifically rejected by the court in the *Florida Retail Federation* case. In response to the Attorney General's request to rewrite Sec.

790.251, to accomplish its clearly stated legislative objectives, the court there stated that "when the language of a statute is this clear, a court's job ordinarily is to apply the statute as written, not to rewrite it in the belief that the Legislature must have meant something else." The court went on to state that "the Attorney General offers no constitutionally sufficient explanation for the statute's distinction between the businesses that are and are not required to allow guns, but the Attorney General says the distinction is just an error in drafting—that the distinction disappears when the statute is properly construed to mean what the Legislature intended rather than what the Legislature said. The intervening defendant National Rifle Association says the statute means what it says and is constitutional as so construed." *Florida Retail Federation*, 576 F. Supp. 2d (N.D. Fla. 2008). The court declined to rewrite the statute and held it unconstitutional.

If a court cannot rewrite a statute to save it based on the clear words of the legislature' statement of intent, how can a court rewrite a statute based on floor debate statements by three individual legislators, who were talking about another law enacted 16 years earlier that they took no part in drafting?

**The treatment of different categories of schools differently is not an absurd result but is rational and is specifically contemplated by the statutes.**

It is well established that the rights, obligations and roles of public elementary and secondary schools and their students are different and distinct from those at the post secondary or college level. See, *Morse v. Frederick*, 551 U.S. 393, 396 (2007).

This has been held to be true for First Amendment free speech cases, religious expression cases, and funding cases, and Fourth Amendment cases. The Court's have reasoned that the greater standard of control is necessary at the younger ages in part because of the schools responsibility for the safety and welfare of the students, that does not exist at the college level.

The Florida legislature also expressly recognized that there is a distinction between K-12 schools and universities in 790.115. While under (2)(a) of Sec. 790.115 firearms are generally banned from the property of any school, subsection (1) prohibits exhibition of firearms on any school property or within 1000 feet of a "public or private elementary school, middle school, or secondary school, during school hours or during the time of a sanctioned school activity". Interestingly the 1000 foot provision is never referenced in regards to post-secondary schools, a clear indication that the legislature understood the difference and determined there was a necessity to treat the different types of schools differently. Despite the legislature's definition of the word "school" later in the statute, it is clear that the word's use in the last sentence of 790.115(1) was limited to elementary, middle, and secondary schools as identified in the immediately preceding sentence.

In fact if it was the legislatures intent to ban all firearms from school property in all instances as the Defendants suggest Sec. 790.251 was intended, there would be no need for the provision in Sec. 790.115 that allows possession of a securely encased firearm in a vehicle as an exception to the general prohibition of firearms from school property. Nor would there be a need to grant school districts the authority to restrict firearms for purposes of student and campus parking privileges if there was a general

intent to always ban firearms from all school campuses including those securely encased in a vehicle. According to Defendants the language in Sec. 790.251would have already banned all firearms from all campus under any circumstances. This is a situation clearly not contemplated by the legislature considering its specific language in Sec 790.115 allowing for an exception for firearms in private conveyances. And would render the provisions of Sec. 790.115 meaningless.

**Allowing the unelected president of UNF to create a felony where none previously existed would constitute an unconstitutional delegation of authority which the legislature could not have intended.**

In addition to the different ages of the students, with Defendants' students being legal adults, the legislature could not have intended to empower non-elected officers of private businesses that operate a non-public schools with the authority to create a felony where none existed before by the publishing of a waiver. To do so would be a clearly unconstitutional grant of authority.

As discussed above, the publishing of a waiver pursuant to Sec. 790.115, creates, by law, a crime where none previously existed. A general employer who makes a rule contrary to Sec. 790.251, breaks the law, but by having such a rule does not make the individual who breaks the rule a criminal. A school district that properly publishes a waiver pursuant to Sec. 790.115, makes an 18 year-old student with a firearm securely encased in his car a felon, based merely on its publishing of the wiaver.

The distinction between public and private schools is proper and was critically necessary to the drafting of Sec. 790.115. Without such distinction there could be no rational basis whatsoever for the legislature's grant of waiver authority. For the waiver authority granted in Sec. 790.115 to withstand any level of constitutional scrutiny, the authority to control creation of a felony statute could only be granted to an elected constitutional officer or group of officers, such as a school board, the duly elected governing body of a school district. To apply the statute any differently would make it clearly invalid as any delegation to a private individual to create a felony based on the exercise of their own discretion would constitute an unconstitutional delegation of legislative authority. As there is also no authority expressed for the Defendants who are a non-elected officer and president of the university and the university itself to enact or promulgate and enforce such a waiver, it did so in clear violation of 790.33.

**CONCLUSION**

There is no support for Defendants' argument that the rules and regulations attached in this action are statutorily authorized. Absent any federal constitutional arguments, 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 firearm securely encased in their vehicle, and that doing so should not be a crime, including when carried onto a school campus. The legislature has further determined that local school boards, made up of officials elected by the people may, for limited purposes, prevent the possession of securely encased firearms on school campuses under their control. The legislature has not granted any affirmative authority to Defendants to publish a waiver of the secure encasement provisions of Sec. 790.115,

and 790.25, Fla. Stat.

Sec. 790.25, by its plain terms states that is is superior to any statute that might be in conflict and that it should be liberally construed in favor of bearing arms. A court has no authority to overturn a clearly stated legislative intent or direction of construction.

Plaintiffs respectfully request the Court find that Defendants have no statutory authority to enact the regulations complained of in this case, deny the motion to dismiss, and order the Defendants to file an answer to the complaint.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing was served via US Mail this 26th day of March 2012 to:

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