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MEMORANDUM

TO: Senator Pete Kelly, Senator Kevin Meyer, University of Alaska President Pat Gamble

FROM: Chad Hutchison, Senate Majority Counsel 

DATE: April 3, 2014

RE: Judiciary Committee Substitute for Senate Bill 176 ("CS for SB 176")

CURRENT UNIVERSITY OF ALASKA POLICY ON LAWFUL CONCEALED CARRY IS NOT THE LEAST RESTRICTIVE ALTERNATIVE AND THEREFORE IS A VIOLATION OF TWO EXPRESS, INDIVIDUAL, FUNDAMENTAL RIGHTS GUARANTEED BY THE ALASKA CONSTITUTION (THE INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS AND THE INDIVIDUAL RIGHT TO PRIVACY)

I. THE ALASKA CONSTITUTION, FUNDAMENTAL RIGHTS AND ALASKA'S STRICT SCRUTINY ANALYSIS

1. IDENTIFICATION OF RIGHTS

If the state, or a political subdivision of the state is going to restrict lawful concealed carry, it invokes not one, but two, bedrock, fundamental, constitutionally protected rights: The individual right to keep and bear arms and the express, individual right to privacy.

The right to keep and bear arms is enshrined in Article I, Section 19: "The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State."

In addition, the Alaska Constitution, unlike the Federal Constitution, expressly protects an individual's right to privacy.¹ Article I, Section 22 states: "The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

Alaska is one of the few states to have a constitutional privacy guarantee.² The Alaska Supreme Court has consistently held that this explicit guarantee provides more protection of individual rights than the Federal Constitution.³ Specifically, as stated by Justice Boochever:

[S]ince the citizens of Alaska, with their strong emphasis on individual liberty, enacted an amendment to the Alaska Constitution expressly providing for a right to privacy not found in the United States Constitution, it can only be concluded that the right is broader in scope than that of the Federal Constitution.⁴

2. DETERMINING THE LEVEL OF SCRUTINY

After identifying the individual rights, the next phase is to properly determine the level of scrutiny for review.⁵

If the individual rights prove to be fundamental, a relevant court is required to review the policy using a "strict scrutiny analysis" for each right restricted.⁶ In other words, the policy may only survive if the political subdivision of the State (in this case, the University)⁷ can establish that the policy advances a compelling state interest using the least restrictive means possible.⁸

A. DOES THE UNIVERSITY HAVE A "COMPELLING STATE INTEREST"?

Yes. The protection of the students, facility and staff is a compelling state interest.

The next question is whether the University restriction on lawful concealed carry is the least restrictive means possible.

B. IS THE CURRENT UNIVERSITY POLICY THE "LEAST RESTRICTIVE MEANS" POSSIBLE?

No. As admitted by the University on page 5 of the March 31, 2014 Memorandum to the Co-chairs of the Senate Finance Committee, the current policy is "minimally restrictive" instead of the required "least restrictive" alternative (which must be done when restricting two fundamental rights).

¹ See *Mat-Su Coalition for Choice v. Valley Hospital Association, Inc.*, 1993 WL 13013293, *5-6 (Alaska Super. 1993).

² Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina and Washington also have express privacy guarantees in their state constitution. Alaska, along with Florida, Hawaii and California have free-standing provisions in their state constitutions. See Ezzard, *State Constitutional Privacy Rights Post Webster*, 67 Denver Univ.L.Rev. 401, 418-419 (1990).

³ See *Messerli v. State*, 626 P.2d 81, 83 (Alaska 1980).

⁴ See *Ravin v. State*, 537 P.2d 494, 514-515 (Alaska 1975). (Emphasis added).

⁵ See *State v. Planned Parenthood*, 171 P.3d 577, 581 (Alaska 2007).

⁶ *Id.*

⁷ The "University" shall also be known as "U of A", "University of Alaska."

⁸ See *Planned Parenthood*, 171 P.3d at 581.

Firearms are permitted, according to the University, but at “approved and supervised activities”, including rifle ranges, gun shows, vehicles in parking lots, faculty or staff residences⁹ and undeveloped and uninhabited land.¹⁰

The paragraph concluded by stating “[t]hus members of the public who are merely transiting campus or who cross undeveloped land currently face no constraints on their Second Amendment rights.”¹¹

But that’s simply not true. There certainly have been constraints on Alaska’s individual, constitutional guarantee to keep and bear arms. On April 28, 2010 on the University of Alaska – Anchorage campus, peaceful, law-abiding citizens transiting on campus were issued an alleged Notice of Regulation Violation before leaving.¹²

II. THE UNIVERSITY, IN THE MARCH 31, 2014 MEMORANDUM, INCORRECTLY RELIES ON *DISTRICT OF COLUMBIA V. HELLER* (A “LESS BROAD” INTERPRETATION OF THE FEDERAL CONSTITUTION) AND *DIGIACINTO V. GEORGE MASON UNIVERSITY* (A VIRGINIA STATE CASE) TO MISTAKENLY INTERPRET FUNDAMENTAL, INDIVIDUAL RIGHTS THAT ARE PROPERLY REVIEWED PURSUANT TO THE ALASKA CONSTITUTION, USING ALASKA PRECEDENT.

The Alaska Supreme Court has recognized that the individual fundamental rights in the Alaska Constitution are interpreted broader than the Federal Constitution.¹³ Individual fundamental rights include the individual right to keep and bear arms (which was specifically added to the State Constitution, via amendment, in 1994), and Alaska’s express, individual right to privacy.

1. ANALYSIS OF *DISTRICT OF COLUMBIA V. HELLER*

Despite Alaska’s precedent on individual liberties, the University of Alaska chose to rely on *District of Columbia v. Heller*, 554 U.S. 570 (2008). *Heller*, a case with significant negative treatment, originated from the United States District Court for the District of Columbia.¹⁴ The case involved a special police officer seeking, on federal second amendment grounds, to enjoin the District of Columbia from enforcing gun-control statutes.¹⁵

The U.S. Supreme Court ultimately held that the Second Amendment conferred an individual right to keep and bear arms and that statutes banning handgun possession in a home violated the Second Amendment.¹⁶

⁹ Ironically the University facility and staff are afforded rights that some lawful, qualified students are not. The burden is on the University to explain why the policy is not a violation of equal protection.

¹⁰ See March 31, 2014 Memorandum at page 5.

¹¹ See March 31, 2014 Memorandum at page 5. The Second Amendment merely provides the federal foundation upon which our Alaska Constitution rests. Alaska’s individual right to keep and bear arms is interpreted more broadly. In other words: There is more protection for the individual, beyond the language in the federal Second Amendment.

¹² <http://www.uaa.alaska.edu/news/gun-protest-on-uaa-anchorage-campus.cfm>

¹³ See *Ravin*, 537 P.2d at 514-515.

¹⁴ *Heller*, 554 U.S. at 570.

¹⁵ *Id.* at 570-571.

¹⁶ *Id.* at 636.

The University, via their memorandum, stated:

In *Heller*, the US Supreme Court case confirming the individual right to bear arms under the US Constitution, the majority stated that “[N]othing in our opinion should be taken to cast doubt on...laws forbidding the carrying of firearms in sensitive places such as schools and government buildings...” According to the *Heller* majority, such regulations are “**presumptively lawful.**” University premises are indisputably school and/or government buildings. In addition, UA campuses are home to numerous partnerships and programs with K-12 that results in thousands of K-12 students being present on campus every day. Thus an individual has no constitutional right to carry a firearm on developed University premises.¹⁷

Discounting the fact that Alaska interprets individual liberties more broadly than the U.S. Constitution, or that the University admits that firearms, unlike in other “sensitive” government buildings, are regularly on Alaska campuses already,¹⁸ the passage directly contradicts Alaska precedent.

The standard in Alaska is not that a political subdivision of Alaska’s restrictive firearm policy is “presumptive lawful.” On the contrary, the burden is on the University, free of presumption, to prove their restriction is necessary to a compelling state interest and the least restrictive means available.

In addition, contrary to the representations by the University, the CS for SB 176 specifically states: “The Board of Regents and the president of the university may not adopt or enforce a policy that restricts, in a manner inconsistent with AS 11.61.190-11.61.220.”¹⁹

2. ANALYSIS OF *DIGIACINTO v. GEORGE MASON UNIVERSITY*

A review of *DiGiacinto v. George Mason University* reveals that it is Virginia state case.²⁰ Ignoring the fact that Virginia is not in the Ninth Circuit, and *DiGiacinto* would, under most circumstances, lend little weight to most decisions by an Alaskan court, the *DiGiacinto* challenge was based, according to the University’s March 31, 2014 Memorandum, on “state and federal constitutional grounds.”²¹

A close review reveals that *DiGiacinto* filed a complaint seeking a declaratory judgment and injunctive relief against George Mason, claiming that a regulation prohibiting possession of firearms on campus violated his constitutional right to carry a firearm.²² *DiGiacinto*, as it relates to the state constitution, argued that George Mason’s firearm policy violated Article I, Section 13 of the Virginia Constitution.²³

Unfortunately for the University of Alaska, Virginia’s Constitution bears almost no resemblance to Alaska’s Constitution (either in form or substance to either Alaska’s individual right to keep and bear arms or the express individual right to privacy).

¹⁷ See March 31, 2014 Memorandum at page 2. (Emphasis as stated in original document).

¹⁸ <http://fm.kuac.org/post/despite-policy-weapons-still-appear-university-campus>.

¹⁹ AS 11.61.210 (7) specifically references preschool, elementary, junior high, or secondary school students.

²⁰ *DiGiacinto v. George Mason University*, 281 Va. 127, 704 S.E.2d 365 (Virginia 2011).

²¹ See March 31, 2014 Memorandum at page 3.

²² *DiGiacinto*, 281 Va. at 130-132.

²³ *Id.*

Article I, Section 13 of Virginia's Constitution states as follows:

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

There is no mention of the individual right to bear arms. There is no express right to privacy which is guaranteed by Alaska's Constitution.

In fact, *DiGiacinto* is not dispositive at all. The Virginia state court specifically states that when provisions of the Constitution of Virginia are substantially similar to those in the United States Constitution, they will be afforded the same meaning.²⁴ The Virginia court opined: "Thus, for the purposes of this opinion, we analyze DiGiacinto's state constitutional rights and his federal constitutional rights concurrently."²⁵

Alaska courts, historically, have overwhelmingly rejected that analysis, as the Alaska Constitution is: (a) significantly different from the Federal Constitution; and (b) significantly broader than the Federal Constitution.²⁶

In other words: The University of Alaska, by relying on *Heller* and *DiGiacinto* (as it relates to individual fundamental liberties guaranteed in the Alaska Constitution) is simply wrong. If an Alaskan Supreme Court Justice drafted an opinion that included that Virginia language (i.e. reviewing state constitutional rights and federal constitutional rights concurrently), particularly as it relates to the individual right to keep and bear arms or the individual right to privacy, it would be a complete, dramatic reversal of long-standing Alaska precedent.

Alaska's Constitution requires broad interpretation as it relates to individual liberty and fundamental rights.

III. THE CS FOR SB 176 IS THE LEAST RESTRICTIVE ALTERNATIVE

Contrary to assertions by the University, the current firearm policy changes little, but for the express provision of the CS to SB 176:

Section 1. AS 14.40 is amended by adding a new section to read: **Sec. 14.40.173. Possession of concealed handguns.**

(a) The Board of Regents and the president of the university may not adopt or enforce a policy that restricts, in a manner inconsistent with AS 11.61.190 - 11.61.220, the possession of a concealed handgun by a person having a permit to carry a concealed handgun under AS 18.65.700 - 18.65.790.

²⁴ *DiGiacinto*, 281 Va. at 134.

²⁵ *Id.*

²⁶ See *Ravin*, 537 P.2d at 514-515; See *State v. Planned Parenthood*, 171 P.3d at 581.

(b) Notwithstanding (a) of this section, the Board of Regents and the president of the university may adopt and enforce a policy that limits the possession of a concealed handgun in student housing on university property. However, the policy must allow a person having a permit to possess a concealed handgun under AS 18.65.700 - 18.65.790 to possess a concealed handgun in student housing on university property if the person

(1) provides proof of the permit to a designated university employee; and

(2) stores the handgun in a lock box at all times when the handgun is not concealed and within the person's immediate control while in student housing on university property.

(c) In this section,

(1) "concealed handgun" has the meaning given in AS 18.65.790;

(2) "lock box" means a device with a locking mechanism that restricts access to a concealed handgun to persons other than the permit holder.

In other words, the University can still have gun shows, guns in vehicles, guns in faculty or staff residences, etc., but the University will also allow lawful concealed carry permit holders, including law concealed carry permit holders in residence halls for qualified students. Proactive enforcement of firearm violations can still go forward, just as it always has.

Allegations that the CS prevents the University from "meeting applicable standards of care", "taking appropriate action" or "from meeting standards in state law," is simply an incorrect reading of the CS and AS 11.61.190 - 11.61.220.

IV. CONCLUSION – THE COMMITTEE SHOULD SUPPORT THE CS TO SB 176

The University alleges that "UA's policies are presumptively constitutional because they apply to 'sensitive places' identified in federal and state law, i.e. schools and government buildings, and involve circumstances analogous to longstanding prohibitions."²⁷

The University, unfortunately, relies heavily on a mistaken interpretation of the "lower standard" federal right to keep and bear arms and irrelevant non-Alaska, state court rulings (from states with completely different constitutions). Concurrently, the University, as it relates to concealed carry, completely fails to address the additional fundamental express right to privacy guaranteed in the Alaska Constitution.

Alaska precedent is clear. The "fundamental right" language in the Alaska Constitution is significantly different than its federal foundation or other state constitutions. The Alaska Supreme Court has interpreted Alaska's individual liberties much broader than the language the University detrimentally relies upon.

²⁷ See March 31, 2014 Memorandum at page 3. The University, at times, appears to compare itself to warranting the same restrictions as a K-12 school, (despite the fact the median student age on some University campuses is 25 years old. See <http://www.uaf.edu/facts/>).

The University is not like a courthouse, state capitol or another “governmental building.”

Normal citizens²⁸ cannot bring firearms into a court house. Normal citizens do certainly bring firearms to the University.

Residents with firearms do not live in the state capitol building. Residents with firearms do already live at the University.

The University, as admitted on page 5 of the March 31, 2014 Memorandum, does not truly have “longstanding prohibitions” (similar to court houses, the state capitol or other “governmental buildings”) as guns routinely, already appear on state campuses.

The CS for SB 176 is about individual liberty and bedrock, fundamental rights. The University has the burden to provide a least restrictive alternative if they chose to limit the individual right to bear arms and the individual right to privacy.

Thus far the University has failed to provide that least restrictive alternative.

The CS for SB 176 should advance.

²⁸ Non-Law Enforcement.