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UNIVERSITY of ALASKA
Many Traditions One Alaska

March 31, 2014

TO: The Honorable Pete Kelly, Co-Chair, Senate Finance
The Honorable Kevin Meyer, Co-Chair, Senate Finance

THROUGH: Pat Gamble, President, University of Alaska

FROM: Michael Hostina, General Counsel, University of Alaska &
Matt Cooper, Associate General Counsel

RE: Legal Issues Posed by the Judiciary CS for SB 176

Thank you for the opportunity to provide input regarding the legal issues posed by the Judiciary Committee Substitute for SB 176 (hereafter CS), a bill relating to the regulation of firearms by the University of Alaska.[1]

The CS would require that the university permit concealed carry of handguns by permit holders on all parts of campus (other than in university pubs and in day care centers where other laws restrict possession). The CS provides that in student housing, the University could require the permit holder to provide proof of the permit and keep the handgun in a lock box when not concealed and within the person's immediate control.

The CS (and the original bill) create numerous practical and legal issues, but as discussed below, **neither are required to effectuate the constitutional right to bear arms.** In addition, both bills create compelling safety and risk management issues.

A. There Is No Constitutional Right To Carry Firearms On Developed University Premises

Supporters of the CS (and the original bill) argue that a bill is required because the University's present policy of limiting firearms on the developed premises of the University is unconstitutional. While they acknowledge that the University's policy addresses a compelling state interest in safety and prudent risk management, they argue that there is a constitutional right at issue, a "strict scrutiny" standard applies and that UA must use the least restrictive alternative to meet these compelling interests.

[1] Many of the issues raised by the CS overlap with issues raised by the original bill. Because the original bill was analyzed in a March 5, 2014, memo to Senate Majority Leader John Coghill and is part of the record, this memo will focus on the issues posed by the CS.

However, this analysis is based on a clearly flawed assumption, i.e., that there is a constitutional right to bear arms on developed University premises. That is not the case. The argument concludes with an additional error: that the CS is an alternative that would actually allow the University to address the compelling state interests of safety and prudent risk management.

1. The US Supreme Court Has Clearly Stated That Restrictions On Firearms On School Property And In Government Buildings Are "Presumptively Lawful"

The assumption that there is a constitutional right to carry firearms on school property or in government buildings is erroneous. If there was such a right, the legislature presently would be violating that right by **banning** firearms in the Capitol Building, on K-12 property, and in court system facilities.[2]

In *Heller*,[3] 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 . . .***"[4] According to the Heller majority, such regulations are "***presumptively lawful.***"[5] University premises are indisputably schools 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.

Despite hundreds of cases contesting firearms restrictions since the 2008 decision in *Heller*, **there are no reported state or federal cases striking down university or college firearm regulations on constitutional grounds.**[6] To the contrary, in a case[7] contesting firearms restrictions imposed by George Mason University,[8] the Virginia

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[2] Federal case law is clear that a complete ban on firearms-related conduct that is in fact protected by the Second Amendment is unconstitutional. Thus for a ban to survive constitutional scrutiny, it must involve conduct not protected by the second amendment. Per *Heller then*, "presumptively lawful" firearms bans in schools and government buildings are not protected by the Second Amendment.

[3] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

[4] *Id.* at 626– 627.

[5] *Id.* at 627. "We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive."

[6] Supporters confuse cases involving conflicts between university policy and state law (University of Utah, University of Colorado, University of Florida) with cases questioning the constitutionality of university regulations in light of the Second Amendment or state analogues . The former involve questions of legislative authority, not constitutional rights.

[7] *Digiacinto v. George Mason University*, 281 Va. 127, 704 S.E.2d 365 (Virginia 2011).

[8] The George Mason regulation states: "Possession or carrying of any weapon by any person, except a police officer, is prohibited on university property in academic buildings, administrative office buildings,

Supreme Court held that George Mason University was both a government entity and a school and thus a "sensitive place"[9] where under *Heller,* firearms restrictions are presumptively valid. The challenge to George Mason's regulation was brought on both state and federal constitutional grounds. Though the appellant could have sought review of the federal constitutional issue by the US Supreme Court, no request for US Supreme Court review was filed.[10]

The same analysis holds true under the Alaska Constitution. In 1994 the voters of Alaska amended Alaska's constitution to add the second sentence of Article I, Section 19, thus establishing an individual right to bear arms under Alaska's Constitution. In *Wilson v. State,*[11] the Alaska Court of Appeals looked at whether the 1994 amendment to Article I, Section 19 invalidated Alaska law prohibiting felons from possessing firearms. Since voters had approved the amendment to the constitution, the Court of Appeals determined the breadth of the right by examining the "meaning placed on the amendment" by the voters. Because the voters had been assured that existing laws would not be affected by the amendment, the Court concluded that the voters had not intended to invalidate existing Alaska laws regulating firearms. Thus the voters who passed the amendment did not intend to create a constitutional right that extends, for example, to carrying firearms in schools, to concealed carry under 21, to courts or other government buildings, all of which were restricted in 1994.

2. Because Regents' Policy And University Regulation Only Apply To Developed University Premises Which Are defined By The Courts As "Sensitive Places," No Constitutional Right Is Implicated And Strict Scrutiny/Narrow Tailoring Requirements Do Not Apply

Since *Heller*, courts typically have adopted a two-step analysis in Second Amendment cases. The first step is to determine whether a challenged policy or law is outside the scope of the Second Amendment's protection.

> To determine whether a challenged law falls outside the historical scope of the Second Amendment, we ask whether the regulation is one of the "**presumptively lawful** regulatory measures" identified in Heller, 554 U.S. at 627 n. 26, . . .[12] (Emphasis in original.)

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student residence buildings, dining facilities, or while attending sporting, entertainment or educational events. Entry upon the aforementioned university property in violation of this prohibition is expressly forbidden." The court also held, presumably in the alternative, that this regulation was narrowly tailored.

[9] *Digiacinto* 704 S.E.2d at 370. "The fact that George Mason is a school and that its buildings are owned by the government indicates that George Mason is a 'sensitive place.'"

[10] The National Rifle Association participated in the case as an amicus.

[11] 207 P.3d 565 (Alaska App. 2009).

[12] *Jackson v. San Francisco*, 2014 WL 1193434 (C.A.9 (Cal.), decided March 25, 2014.

If the restriction is presumptively lawful, as is the case with sensitive places including schools and government buildings, the analysis stops there and the restriction is considered presumptively constitutional.

However, even if the law is within the scope of the Second Amendment, there is no default to strict scrutiny. The appropriate level of scrutiny still must be determined. Whether "strict scrutiny" applies depends on two factors:

> If a prohibition falls within the historical scope of the Second Amendment, we must then proceed to the second step of the Second Amendment inquiry to determine the appropriate level of scrutiny. Chovan, 735 F.3d at 1136. When ascertaining the appropriate level of scrutiny, "just as in the First Amendment context," we consider: "(1) 'how close the law comes to the core of the Second Amendment right' and (2) 'the severity of the law's burden on the right.' " Chovan, 735 F.3d at 1138 (quoting Ezell, 651 F.3d at 703). . . .
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> As we explained in *Chovan,* laws which regulate only the "*manner* in which persons may exercise their Second Amendment rights" are less burdensome than those which bar firearm possession completely. 735 F.3d at 1138;[13]

Even if there were a constitutional right to bear arms in schools and government buildings, strict scrutiny would not apply in a case involving government regulation of firearms on government premises. The University's policies do not restrict firearms in the broader community or constitute a ban, even on University premises. The University regulates firearms **only on University-controlled premises, in those limited areas for which it is responsible.**[14] The University's policy does not intrude into the community at large or into private homes to broadly restrict firearms possession or use. University restrictions apply only in a part of the broader community, i.e., on the University's developed premises, and even then with exceptions. *Heller*'s broad declaration that firearms restrictions in sensitive places are presumptively lawful makes clear that it would be error (and perhaps disingenuous) to focus on a restriction's impact in a limited area rather than on its impact in the community at large or in private homes. Otherwise the most narrowly tailored restriction could be shown to be unduly burdensome in that narrow area.

The University's developed premises and buildings have been defined by both the courts and the Alaska legislature as sensitive places in which firearms regulation is

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[13] *Id.*

[14] Such a restriction is analogous to permissible time, place and manner restrictions in First Amendment speech cases.

presumptively lawful and outside the scope of the Second Amendment's protections.[15] As a result, no further constitutional analysis is appropriate, much less an analysis applying strict scrutiny.

B. Concealed Carry By Permit Is Not Less restrictive Or More Effective Than Current University Policy

For the reasons discussed below, the concealed carry permit system in the CS is not less restrictive than current policy in certain circumstances. The CS would potentially intrude on the rights of everyone who brings a firearm to campus while preventing the University from addressing the acknowledged compelling interests of safety and prudent risk management on UA campuses.[16]

1. UA's Current Policy Is Minimally Restrictive But Effective

UA's current policy does not ban long guns from campus, or require everyone bringing a handgun to campus to have a concealed carry permit. Absent special arrangements, weapons are not permitted in UA buildings, including student dorms, classrooms, labs and meeting places. Weapons are permitted: at approved and supervised activities, including rifle ranges, gun shows, etc.; in cars on streets and in parking lots; by faculty or staff in residences; on undeveloped and uninhabited land. Thus members of the public who are merely transiting campus or who cross undeveloped land currently face no constraints on their Second Amendment rights.

Bill supporters argue that the University's current policy does not prevent concealed guns on campus and thus creates safety and liability problems. This argument ignores the fact that a permit requirement also could be ignored and will create other difficulties. It also is based on a flawed assumption that rules only have value if they are followed. Even criminal law does not prevent all crimes from occurring. Nor does the CS simply preserve the status quo.

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[15] The Virginia Supreme Court put it this way: "Further, the statutory structure establishing GMU is indicative of the General Assembly's recognition that it is a sensitive place, and it is also consistent with the traditional understanding of a university. Unlike a public street or park, a university traditionally has not been open to the general public, "but instead is an institute of higher learning that is devoted to its mission of public education." Moreover, parents who send their children to a university have a reasonable expectation that the university will maintain a campus free of foreseeable harm." *Digiacinto* 704 S.E.2d at 370. (Citations omitted.)

[16] If strict scrutiny applied, a court would consider whether the compelling government interest actually could be met by a less restrictive means. The test is thus two parts: is a less restrictive alternative available; and does the alternative still meet the compelling state interest. The CS does not meet those interests and thus does not demonstrate that there is a less restrictive alternative for the University's policy. Again, restrictions that apply only to schools and government buildings like the University's restrictions are excepted from Second Amendment coverage.

UA's policies, like criminal laws, allow UA to take action when it becomes aware of a violation, in this case, the presence of any weapon on developed premises.[17] This is particularly important in problematic circumstances common on University campuses and described in more detail below. The CS, however, would prohibit any UA response even in circumstances when UA knows of a threatening situation and thus is likely to be held liable for failure to act.

C. The CS Prevents the University From Meeting Applicable Standards Of Care While Increasing The Potential For Foreseeable Harm and Liability

Generally the University only may be held liable for harm that occurs on campus if its actions have not met the standard of care that applies to a particular incident. However, if a crime or injury is "legally caused" by the University's breach of a standard of care it owes to the injured party, the University will be liable. The foreseeability of harm is an important factor in determining legal causation, particularly with respect to third-party acts.

1. A University Is In A Unique Position of Responsibility For Its Students

The standard of care imposed on the University with respect to students and other invitees on campus is quite high compared to the standard of care imposed, for example, on a municipality for public streets or open spaces like parks. This is due to a variety of factors, including that UA is deemed to be in control of its developed property, invites young people onto its property, educates, feeds and houses them under its supervision and is treated by parents, federal law and state common law as responsible to a significant degree for the well-being and safety of students.

2. The CS Prevents The University From Meeting Standards In State Law

The CS increases the likelihood that UA will be held liable for weapons-related crimes, as well as accidents and injuries relating to firearms. It does so by preventing UA from regulating firearms consistent with the standards in current state law. The CS would require that UA allow concealed carry permit holders to carry handguns in sensitive areas and situations on UA campuses when state law criminalizes firearms possession in similar circumstances off-campus. These situations include:

- Possession of a firearm on the grounds of a K-12 school is a crime - but the CS would require UA to permit firearms in areas where K-12 students are regularly on UA's 16

[17]Supporters discount the potential for identifying concealed carry. However, the University is a small community where information about firearm possession may be shared by roommates, classmates or by the owner, sometimes willingly to brag or intimidate, and sometimes unwittingly.

campuses in large numbers, sometimes in extended residential, enrichment and college prep programs, often daily after school.

- Concealed carry under 21 is a crime - but the CS would require permitting firearms in dorms where 60% of UA residential students are under 21, and where, unlike private housing, UA is the "adult" – UA retains authority and responsibility for dorms, and hires Resident Assistants to maintain safety, order and provide counseling;

- Possessing a loaded firearm in a place where intoxicating liquor is served is a crime - but the CS would require UA to permit firearms in dormitories where liquor is present;

- Possession of a firearm in a child care facility or adjacent parking lot is a crime - but the CS would require permitting firearms in nearby locations since both UAA and UAF have child care facilities integrated on campus;

- Possession of a firearm in a court facility is a crime, but the CS would require UA to permit firearms in potentially contentious adjudications of staff and student disciplinary and academic issues;

- Possession of a firearm on the grounds of a domestic violence shelter is a crime - but the CS would require UA to permit firearms in health and counseling centers as well as sexual harassment offices.

Supporters of the CS state that UA will be able to take action with respect to any crimes that are committed under these statutes. That is true, but misleading. UA will be placed in a situation where it cannot act before harm occurs where the harm is foreseeable, or apply the standard of care suggested by these statutes in analogous but non-criminal situations. However, UA will still be held to those higher standards.

The CS also would not allow UA to meet the standard of care related to the permit requirement. Other than in the dorms, the CS provides no authority for UA to determine whether someone who carries concealed actually has a permit. Thus while UA would be expected to ensure that only permit holders carry firearms on campus, it will be unable to do so.

3. The CS Does Not Meet Standards In The Report To The NRA By The National School Shield Task Force

Supporters of the CS argue that UA could be liable for failing to permit weapons on campus in the event of a mass shooting. That argument is not supported by any legal standard of which we are aware, and is inconsistent in at least two respects with recommendations (standards) contained in the Report to the NRA by the National School Shield Task Force.

That report recommends that schools react promptly to behavior that indicates a risk. Under present policy, UA can respond promptly to reports of any weapons possession on developed property and take appropriate action. Under the CS, that would no longer be the case. The CS would prevent restrictions on permit holders who have committed or who later commit certain crimes. The permit law allows one class A misdemeanor in the past 6 years. So UA could not restrict concealed carry if a permit holder: is convicted once, for example, of violating a protective order, stalking in the second degree, assault in the 4th degree, or is convicted of an Attempt or Solicitation of a Class C Felony.

The CS also would prohibit UA from restricting weapons of permit holders whose behavior indicates risk apart from convictions. For example, someone who is known to possess firearms on campus and who is involuntarily hospitalized for psychological evaluation (which often ends without a formal finding of mental illness or formal commitment for treatment), or who exhibits warning signs including depression, suicidal ideation or gestures, or overt hostility or aggression (everyday occurrences on residential college campuses) could not be deprived of his/her weapons.[18] That's because no state law prohibits possession of weapons by those with psychological disturbances; federal law prohibits possession by those "adjudicated as a mental defective" or "committed to a mental institution." These formal mental health adjudications are relatively rare. Foreseeability of harm creates an expectation and standard that UA will respond when troubling events occur.

The same NRA-sponsored report recommends 60-80 hours of training for selected school employees who are authorized to be armed. By contrast, a concealed carry permit requires only 12 hours of self-defense, legal and weapons handling training. Permitees self-select.

Thus under the CS or the original bill, UA's policy could not meet the NRA's recommended standard for possession of firearms on school grounds or for responding to indicators of threats.

D. Summary And Conclusion

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. Even if that were not the case,

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[18] Jared Lee Loughner was suspended from Pima County Community College for bizarre behavior three months before he killed six people at a constituent's meeting with Representative Gabrielle Giffords. Despite evidence of mental illness he apparently was never formally adjudicated are remained eligible to possess weapons under state and federal law. He thus would have been eligible for a concealed carry permit applying Alaska standards.

strict scrutiny would not be applicable to restrictions that are time, place and manner oriented and that do not apply to broader communities or private homes.

The University's current policy is constitutional, minimally restrictive, and, in contrast to the proposed legislation, effective. Current policy allows the University to take action precisely when harm is foreseeable. By contrast, the proposed legislation would prevent the University from taking action with respect to weapons in problematic circumstances that are commonplace on university campuses. As a result, the rationale for this legislation is fundamentally flawed.

Taken together these limitations will result in inability to remove offenders with weapons from campus, loss of control over conduct on UA premises, and dramatically limit UA's ability to intervene early in conflicts or unsafe behavior. This creates greater potential for situations in which UA is unable to act to prevent foreseeable harm to third parties and greater potential for liability.

Because UA owes a duty of care to students and invitees on campus, and because the CS as well as the original bill would prohibit UA from meeting the standard of care suggested by existing state law and other sources of applicable standards, in circumstances where harm is foreseeable, this legislation will lead to an increased potential for liability in the event of weapons-related crimes or accidental injuries on campus.

Violence on campus is extremely rare. However, legislation that forecloses the possibility of proactive response to behavior that places the University on notice of foreseeable harm is not sound public policy and should be avoided, particularly where it solves no other problem.