

IN THE COURT OF APPEALS OF THE STATE OF OREGON

OREGON FIREARMS EDUCATIONAL
FOUNDATION, an Oregon nonprofit
corporation,

Petitioner,

v.

OREGON STATE BOARD OF HIGHER
EDUCATION and OREGON
UNIVERSITY SYSTEM,

Respondents.

CA A142974

PETITIONER'S REPLY BRIEF

Judicial Review of Administrative Rule of the Oregon State Board of Higher
Education, amending OAR 580-022-0045(3), adopted January 18, 1991, and
effective January 31, 1991.

Vance D. Day, OSB No. 912487
ADAMS DAY & HILL
339 Washington St. SE
Salem, OR 97302
Telephone: 503-399-2667
Fax: 503-399-1758
E-mail: VDDPC@aol.com
Attorney for Petitioner

James N. Westwood, OSB No. 743392
P.K. Runkles-Pearson, OSB No. 061911
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
Telephone: 503-224-3380
Attorneys for Respondents

August 2010

INDEX OF CONTENTS OF BRIEF

	PAGE
SUMMARY OF ARGUMENTS.....	1
ARGUMENT.....	1
REPLY TO RESPONSE TO FIRST ASSIGNMENT OF ERROR	1
A. Conflict with, and circumvention of, the effect, intent and policy of	
legislation.....	1
B. Board exceeded statutory authority in promulgating rule as broad	
as OAR 580-022-4405(3).....	3
1. ORS 351.070 is sole statutory authority which may be considered.....	3
2. ORS 351.070 does not grant authority to promulgate broad rule.....	4
REPLY TO RESPONSE TO SECOND ASSIGNMENT OF ERROR.....	5
A. ORS 166.170(1) preempts OAR 580-022-0045(3).....	6
B. ORS 166.170(2) preempts OAR 580-022-0045(3).....	10
REPLY TO RESPONSE TO THIRD ASSIGNMENT OF ERROR.....	13
CONCLUSION.....	15

INDEX OF AUTHORITIES

	PAGE
CASES	
<i>Advocates for Effective Regulation v. City of Eugene</i>	
160 Or App. 292, 981 P2d 368 (1999).....	8
<i>AFSCME Local 2623 v. Dept. of Corrections</i>	
315 Or 74, 843 P2d 409 (1992).....	13
<i>District of Columbia v. Heller</i>	
___ US ___, 128 S Ct 2783, 171 L Ed 2d 637 (2008).....	13, 14
<i>Dunn v. State University</i>	
9 Or 357 (1881).....	11
<i>Jane Doe v. Medford School Dist.</i> 549C	
232 Or App 38, 221 P3d 787 (2009).....	5, 6, 7, 9, 12
<i>Kleinsorge v. Reid</i>	
221 Or 558, 352 P2d 466 (1960).....	11
<i>LaGrande/Astoria v. PERB,</i>	
281 Or 137, 576 P2d 1204 (1978).....	3
<i>Ligget v. Ladd</i>	
23 Or 26, 31 P. 81 (1892).....	11
<i>McDonald v. City of Chicago</i>	
561 U.S. ___ (June 28, 2010).....	13
<i>Pacific States Marine Fisheries Commission v. Department of Revenue</i>	
346 Or 117, 206 P3d 1037 (2009).....	11, 12
<i>PGE v. Bureau of Labor and Industries</i>	
317 Or 606, 859 P2d 1143 (1993).....	12
<i>Starrett v. City of Portland</i>	
196 Or App 534, 102 P3d 728 (2008).....	7

State v. Gaines

346 Or 160, 206 P3d 1042 (2009).....12

Students for Concealed Carry on Campus, LLC, et al. v. The Regents of the University of Colorado, et al.

No.09CA1230 (Colo. App. 2010).....10

STATUTES

ORS 166.170.....1, 5, 6, 7, 9, 10, 11, 12, 13, 14

ORS 166.291.....14

ORS 166.360.....1, 3

ORS 166.370.....1, 2, 3, 12, 14

ORS 174.010.....6

ORS 183.400.....1, 3, 4, 8, 13

ORS 294.....11

ORS 297.....11

ORS 351.060.....4, 7, 8, 11

ORS 351.0701, 3, 4, 5, 8, 9, 15

ORS 351.140.....11

ADMINISTRATIVE RULES

OAR 580-022-0045.....1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15

UNITED STATES CONSTITUTION

Second Amendment.....1,13, 14

Fourteenth Amendment.....13

SUMMARY OF ARGUMENTS

OAR 580-022-0045(3) is incompatible with the legislative policy of ORS 166.370. Additionally, the Board only invoked ORS 351.070 as the statutory authority to promulgate their rule. Due to the limited nature of review provided under ORS 183.400, only ORS 351.070 may be contemplated. ORS 351.070 did not grant the Board the authority to promulgate a rule as broad as OAR 580-022-0045(3).

The statutory authority invoked to promulgate OAR 580-022-0045(3) grants the Board the authority to regulate. It was under the authority to regulate, and not under some “proprietary” interest, by which the Board promulgated OAR 580-022-0045(3). Therefore, the rule is subject to the preemptive effect of ORS 166.170(1).

Finally, the United States Supreme Court has applied the Second Amendment right to bear arms to the states. Further, this court’s review may go beyond the face of the rule and extend to the law pertinent to the rule as well. The law pertinent to OAR 580-022-0045(3) demonstrates that the rule has no government interest.

ARGUMENT

REPLY TO RESPONSE TO FIRST ASSIGNMENT OF ERROR

A. Conflict with, and circumvention of, the effect, intent and policy of legislation.

In 1969 the Legislative Assembly passed into law ORS 166.370 which prohibited the possession of firearms while in or on a public building. ORS 166.370(1).¹ A “public building” expressly included any public school, college or university. ORS 166.360(4). However, the Legislature also created an express

¹ The pertinent portions of the current versions of ORS 166.370 and 166.360 continue to use substantially the same language as they did in 1969.

exception to the criminal penalties imposed by this law by stating that, the law does not apply to individuals licensed to carry concealed handguns. ORS 166.370(3)(d).

Regardless of how they are characterized, the 1989 legislative changes to ORS 166 had the intent and effect of permitting a substantially larger population of individuals to obtain concealed handgun licenses and be able to legally carry firearms on university campuses. In making the change to their own policy in 1991, the Board expressly recognized the above described effect of the legislative changes to ORS 166, and deliberately identified that their intent in promulgating OAR 580-22-0045(3) was to circumvent such legislative effect. Indeed, the Board specifically stated that:

“The 1989 Legislature eliminated criminal penalties for possession of concealed weapons by those licensed to carry concealed handguns. Because of the wording of the Board’s Rule, this allowed holders of concealed weapons licenses to bring them on campus or institutionally controlled property. The proposed amendment would reinstate the Board’s previous policy, prohibiting firearms on campus, with certain exceptions.” ER 8.

Respondents now assert that Petitioner did not demonstrate that the Legislature’s failure to criminalize the carrying of permitted concealed weapons indicates its intent to require state agencies to allow permitted concealed weapons in public buildings. Respondents’ Brief at 8. This argument is a mischaracterization of the issue. The legislation clearly stands for much more than a failure to criminalize and the Legislature did not simply forget to address the issue, as Respondents would have us believe. Rather, the Legislature created criminal penalties for carrying a firearm in or on a “public building” and then specifically created an express exception to those criminal penalties for individuals with concealed handgun licenses. APP 2-1,

2-2; ORS 166.360; ORS 166.370. It is evident that when a governing body makes an activity illegal but also creates a specific exception to allow certain people to engage in that activity, that such activity is intended to be legal and permitted for those who fit under that exception.

Indeed, the exception created by the Legislature in ORS 166.370(3)(d) demonstrates their direct contemplation of the issue and embodies their intentional policy that those with concealed handgun licenses be permitted to carry firearms in “public buildings”, including colleges and universities. Respondents themselves point out that an administrative rule is in conflict with state law when it is incompatible with the legislative policy. Respondents’ Brief at 9; *LaGrande/Astoria v. PERB*, 281 Or 137, 576 P2d 1204 (1978). As such, Respondents’ argument fails because OAR 580-022-0045(3) is incompatible with the legislative policy of ORS 166.370.

B. Board exceeded statutory authority in promulgating rule as broad as OAR 580-22-4405(3).

The Board did not assert, or have, the statutory authority to promulgate a rule as broad as OAR 580-022-0045(3).

1. ORS 351.070 is the sole statutory authority which may be considered

The Board cited only ORS 351.070 as the sole statutory authority invoked to promulgate OAR 580-022-0045(3). ER-3, ER-4, ER-6, ER-7. Due to the limited nature of this proceeding, the court should not look beyond ORS 351.070 when contemplating the Board’s statutory authority to promulgate OAR 580-022-0045(3).

Specifically, Petitioner has sought judicial determination of the validity of a specific administrative rule under ORS 183.400. That statute dictates that judicial

review of the rule shall be limited to an examination of (1) the rule itself, (2) the statutory provision which authorized the rule, and (3) documents necessary to demonstrate compliance with rule making procedures. ORS 183.400. Therefore, in this challenge of the validity of OAR 580-002-0045(3) the court is required to only look to the specific statutory authority which the Board actually invoked in promulgating the rule.

Respondents accuse Petitioner of ignoring any authority of the Board to manage university property under ORS 351.060. Respondents' Brief at 8. However, the Board did not invoke any authority under ORS 351.060 throughout the formally required steps for the promulgation of the rule. ER-3, ER-4, ER-6, ER-7. Therefore, any authority under ORS 351.060 may not be considered in this proceeding.

2. ORS 351.070 does not grant authority to promulgate broad rule

The 1989 version of ORS 351.070, which was the Board's sole invoked statutory authority, provided that the Board "for each institution, division and department under its control, shall:...adopt rules and bylaws for the government thereof, including the faculty, teachers, students and employees therein." APP 1-2. Respondents attack Petitioner's interpretation of this statutory provision based on their understanding of the term "including."

In the 1989 version of ORS 351.070(2)(b), the term "including" is used on a lower level of the sentence structure than that recognized by Respondents. Meaning that the preceding words of the statute itself has limited the scope of what the term "including" may encompass. The statute only addresses the Board's authority to adopt rules and bylaws limited to the "institutions, divisions, and departments under

its control” and reads on to state that this includes the “faculty, teachers, students and employees **therein**”.² Use of the term “therein” is a reference back to the institutions, divisions and departments and serves to limit the scope of the rule to encompass only those things or persons within the previously referenced institutions, divisions and departments. Use of the term “therein” prohibits one from reading the statute to say that the Board may adopt rules and bylaws applicable to “any person”, as OAR 580-022-0045(3) does.

The best reading of the statute is that the Board is granted the authority to adopt rules for the government of institutions, divisions and department under its control “including” all of the parts within those institutions divisions and departments (administration, funds, admissions, tuition, curriculum, accreditation, degrees, records, athletics, etc.). One such part “included” in the institutions, divisions and departments is the group of people specified in the statute. The specific listing of “faculty, teachers, students and employees therein” demonstrates the Legislature’s intended limitation on the scope of the Board’s authority after the Legislature had contemplated how far they would like the Board to be able to reach.

REPLY TO RESPONSE TO SECOND ASSIGNMENT OF ERROR

This court expressly stated that ORS 166.170(1) has a preemptive effect independent from ORS 166.170(2). *Jane Doe v. Medford School Dist.* 549C, 232 Or App 38, 61, 221 P3d 787 (2009). Therefore, it is important that both provisions of the statute be the subject of a distinct analysis in order to ascertain each provision’s independent effect.

² Respondents’ quotation of ORS 351.070(2)(b) omits the word “therein” which in turn substantially changes the reading of the statutory provision.

A. ORS 166.170(1) preempts OAR 580-022-0045(3).

First, Respondents seek to limit the scope of ORS 166.170(1) to the class of entities specified in ORS 166.170(2). Respondents' Brief at 17. However, as noted above, ORS 166.170(1) has a preemptive effect independent from ORS 166.170(2). If the Legislature wanted ORS 166.170(1) and (2) to have an identical limited scope then there would be no need for two separate provisions. In the construction of a statute, where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all. ORS 174.010. ORS 166.170(1) has a broader preemptive provision than ORS 166.170(2) and it should therefore be adopted in a manner that will give full effect to its broader preemptive intent.

Further, Respondents have provided no evidence for their assertion that the legislature intended to limit the scope of ORS 166.170(1) to the entities specified in ORS 166.170(2). Respondents offer a misleading quotation from *Jane Doe v. Medford School Dist 549C* in support of their proposition. Respondents' Brief at 16. However, Respondents omit portions of the quotation, having the effect of drastically changing the meaning of the court's statements. The quotation offered by Respondents stated: "[w]e have found nothing in that legislative history suggesting that the legislature intended the scope of its declaration of preemption in ORS 166.170(1) to reach more broadly..." Respondents' Brief at 16. Respondents imply that the "more broadly" language refers to ORS 166.170(2). The complete quotation reveals this to be misleading. The complete quotation reads as follows:

"[w]e have found nothing in that legislative history suggesting that the legislature intended the scope of its declaration of preemption in ORS 166.170(1) to

reach more broadly **to such things as internal employment policies and management directives.**”

(Emphasis added). *Jane Doe v. Medford School Dist.* 549C, 232 Or App at 59.

Respondents conveniently omit language, thus giving the quotation a meaning that it otherwise does not really have. The quotation, in context, demonstrates that the court was simply saying that ORS 166.170(1) is not so broad as to reach such things as employment policies and management directives. In using the phrase “more broadly” the court was not making a comparison to ORS 166.170(2).

As explained below, because the Board has been delegated the authority to regulate, it fits precisely within the class of entities to which the preemptive effect of ORS 166.170(1) was intended to apply. It is evident from the title and text of ORS 166.170(1) that the Legislative Assembly intended to reserve the exclusive “authority to regulate” firearms. As such, ORS 166.170(1) is violated when another entity, without express authority, attempts to “regulate” firearms. A “regulation” is a law or rule enacted under the “organic authority as a governmental entity.” *Jane Doe v. Medford School Dist.* 549C, 232 Or App at 57; See also *Starrett v. City of Portland*, 196 Or App 534, 102 P3d 728 (2008).

Respondents argue that the promulgation of OAR 580-022-0045(3) was not a regulation brought about by the Board under their “organic authority as a governmental entity”. Respondents’ Brief at 17. Rather, the Respondents attempt to cast the Board’s actions as “proprietary” in nature, of which the claimed authority comes from ORS 351.060. Respondents’ Brief at 17. However, Respondents fail to

recognize that their argument does not align with the statutory authority which the Board actually invoked to promulgate OAR 580-022-0045(3).

As noted previously, ORS 183.400, under which the present request for judicial determination was commenced, dictates that judicial review of the rule shall be limited to an examination of (1) the rule itself, (2) the statutory provision which authorized the rule, and (3) documents necessary to demonstrate compliance with rule making procedures. Therefore, in this challenge of the validity of OAR 580-002-0045(3), the court must look only to the statutory authority actually invoked during the promulgation of the rule, that being ORS 351.070. ER-3, ER-4, ER-6, ER-7. Contrary to Respondents' arguments, the Board never invoked, or even referenced, the statutory authority under ORS 351.060 throughout the promulgation of OAR 580-022-0045(3). ER-3, ER-4, ER-6, ER-7. Therefore, Respondents cannot now legitimately argue, close to 20 years later, that they promulgated OAR 580-022-0045(3) pursuant to some "proprietary" statutory authority contained in ORS 351.060.

OAR 580-002-0045(3) is tied directly to only the statutory authority provided in ORS 351.070. The relevant portions of both the 1989 and current versions of ORS 351.070, state that "the board, for each institution, division and department under its control...[(b) Shall] **adopt rules and bylaws** for the **government** thereof, including the faculty, teachers, students and employees therein." (Emphasis added) APP 1-2; ORS 351.070. The ability to **adopt rules and bylaws** for the **government** of an entity and/or group of people is synonymous with the ability to regulate. To "regulate" means to "bring under the control of law or constituted authority."

Advocates for Effective Regulation v. City of Eugene, 160 Or App 292, 308, 981 P.2d

368 (1999). In granting the Board the power to **adopt rules and bylaws** for the **government** of its institutions, the legislature has undoubtedly delegated “regulatory authority” to the Board as a government entity.

The Board specifically invoked the regulatory authority granted to them in ORS 351.070, and in promulgating OAR 580-022-0045(3) under that regulatory authority, the Board enacted the rule under the Board’s “organic authority as a governmental entity.” As identified by this court, the preemptive effect of ORS 166.170(1) was intended to target laws and rules which were enacted by entities acting on their “organic authority as a governmental entity.” *See Jane Doe v. Medford School Dist. 549C*, 232 Or App at 57. In other words the statute limits the regulatory authority delegated to the entity by the legislature. Therefore, ORS 166.170(1) limits the regulatory authority delegated to the Board by the Legislature, resulting in the preemptive effect of ORS 166.170(1) upon OAR 580-002-0045(3).

The above analysis cooperates seamlessly with the legislative intent of ORS 166.170(1). As this court recognized in *Jane Doe v. Medford School District 549C*, the Legislature was intent on addressing the patchwork of existing firearms regulations and protecting a citizen’s right to carry firearms in a law-abiding fashion. 232 Or App at 57-58. The Legislature intended to establish one law so that honest, law-abiding citizens could travel throughout the state without unknowingly violating firearms restrictions. *Id. at 57-60*. OAR 580-002-0045(3) is precisely the sort of inconsistent firearms regulation which the Legislature intended to preempt.

Indeed, courts in other jurisdictions have held that state firearms laws, with similar legislative policies, apply to colleges and universities and their rules and

regulations. In *Students for Concealed Carry on Campus, LLC, et al. v. The Regents of the University of Colorado, et al.*, the Colorado Court of Appeals held that the Colorado Concealed Carry Act (CCA) applied to the University of Colorado. No.09CA1230 (Colo. App. 2010). The CCA specifically states that “A local government does not have authority to adopt or enforce an ordinance or resolution that would conflict with any provision of [the CCA].” *Id.* The court noted that, in enacting the CCA, the Legislature declared that:

“[t]here exists a widespread inconsistency among jurisdictions within the state with regard to ...identification of areas of the state where it is lawful to carry concealed handguns; This inconsistency among jurisdictions creates public uncertainty regarding the areas of the state in which it is lawful to carry concealed handguns.” *Id.*

The university argued that the statutory language did not apply to them because they are an arm of the state and not a “local government.” *Id.* However, in holding that the statute did apply to the university, the Court stated that the university’s position does not comport with the legislature’s intent to have the state occupy the field of regulation of the bearing of concealed handguns and ensure that the laws controlling the use of the permit are consistent throughout the state. *Id.* Similarly, in the present case, the Board’s argument that it is not a “local government”, and therefore it does not fall under the preemptive effect of ORS 166.170(1), does not comport with the Legislature’s intent to reserve the sole authority to regulate firearms.

B. ORS 166.170(2) preempts OAR 580-022-0045(3).

Respondents argue that they are not in the class of entities for whom ORS 166.170(2) was meant to restrict, specifically municipal corporations or districts.

Respondents' Brief at 10. As an initial matter, the Supreme Court of Oregon has stated that the question of whether an entity is a corporation for the purposes of one rule does not speak to whether it is a corporation within the meaning of some unrelated rule. *See Pacific States Marine Fisheries Commission v. Dept. of Revenue*, 346 Or 117, 122, 206 P3d 1037 (2009). As such, Respondents' proffered definitions and analysis from other, unrelated, statutes and sources offer no constructive insight into whether the Board is a corporation under ORS 166.170(2). This includes Respondents' attempt to read-in characteristics such as the power to tax, police power and plenary powers derived from unrelated statutes such as ORS 294 and ORS 297.

Instead, following the process recently employed by the Oregon Supreme Court, this court must first apply basic principles to determine whether the Board is a corporation. *See Pacific States Marine Fisheries Commission v. Dept. of Revenue*, 346 Or at 123-125. The basic principles used to determine if an entity is a corporation include asking whether the entity can sue and be sued, whether the entity can enter into contracts, whether the entity can accept and transfer title to land, and whether the entity has a perpetual existence. *Dunn v. State University* 9 Or 357 (1881); *Pacific States Marine Fisheries Commission v. Dept. of Revenue*, 346 Or at 123-125. The Board, as head of the Department of Higher Education, is a public corporation because it can sue or be sued, enter into contracts, own property and it has a perpetual existence. *See* ORS 351.140; *See also* ORS 351.060; *See also Kleinsorge v. Reid*, 221 Or 558, 564, 352 P2d 466 (1960). Based on these same principles, the Supreme Court has previously held the Board's predecessors to be public corporations. *See Dunn v. State University*, 9 Or at 361; *See also Liggett v. Ladd*, 23 Or 26, 45, 31 P. 81 (1892).

Next, this court must seek to determine if the Board was an entity to which the Legislature intended the preemptive effect of ORS 166.170(2) to apply. *See Pacific States Marine Fisheries Commission v. Dept. of Revenue*, 346 Or at 123-125. The intent of the legislature can be ascertained by examining both the text and context of the statute, along with any relevant legislative history, and, if necessary relevant canons of statutory construction. *State v. Gaines*, 346 Or 160, 171-173, 206 P.3d 1042 (2009); *PGE v. BOLI*, 317 Or 606, 610-612, 859 P.2d 1143 (1993).

In enacting ORS 166.170 the Legislature intended to enact a broad preemption statute designed to address the patchwork of existing firearms restrictions and to protect a citizen's right to carry firearms in a law-abiding fashion. *Jane Doe v. Medford School Dist.* 549C, 232 OrApp at 45, 57-58. Specifically, the statute was designed so that honest, law-abiding citizens could travel throughout the state without unknowingly violating firearms restrictions. *Id.* at 57-60. As such, the gun bill was intended to prohibit other entities from establishing their own gun control regulations, instead leaving it up to the Legislature. *Id.* at 58. OAR 580-022-0045(3), as it applies to "any person", is precisely the sort of firearm restriction which made up the patchwork of restrictions for which the Legislature intended ORS 166.170 to preempt. Therefore, entities maintaining such inconsistent patchwork restrictions, such as the Board, were intended to be subject to the preemptive effect of ORS 166.170(2).

Further, other portions of ORS chapter 166 express the Legislature's intention that those with a concealed handgun license be permitted to carry firearms in or on "public buildings", including colleges and universities. ORS 166.370. Due to the continued existence of that statutory policy, amidst the adoption of ORS 166.170, it

must be assumed that the Legislature intended to continue to give effect to that statutory policy. If government entities such as the Board, whose grant of authority encompasses “public buildings”, were not within the scope of the preemptive effects ORS 166.170(2) then the full effect of other statutory provisions would not be fulfilled. Pursuant to the above analysis, it is clear that the Board is a corporation to which the Legislature intended the preemptive effect of ORS 166.170(2) to apply.

REPLY TO RESPONSE TO THIRD ASSIGNMENT OF ERROR

In *McDonald v. City of Chicago*, the United States Supreme Court recently held that the Second Amendment right to bear arms applies to the states through the Fourteenth Amendment. *McDonald v. City of Chicago*, 561 U.S. ____ (June 28, 2010). The Supreme Court unequivocally reinforced that the Second Amendment protects an individual’s right to keep and bear arms for the purpose of self-defense, and that self-defense is the central component of the right itself. *Id.*; *See also District of Columbia v. Heller*, ____ U.S. ____, 128 S Ct 2783, 171 L Ed 2d 637 (2008). The Supreme Court also made it abundantly clear that the Second Amendment right to keep and bear arms for self-defense, as contained in the Bill of Rights, is a fundamental right. *McDonald v. City of Chicago*, 561 U.S. ____ (June 28, 2010).³

In applying the *McDonald* holding to OAR 580-022-0045(3), this court’s review is not subject to the standard employed for a strictly facial challenge, as asserted by Respondents. Judicial review under ORS 183.400 is “limited to the face of the rule and the law pertinent to it.” *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or 74, 79, 843 P2d 409 (1992). That standard clearly allows the court’s review to

³ The holding of *McDonald*, when read in its entirety, clearly characterizes a broad fundamental right and in no way limits the Second Amendment to the **home**.

go beyond the face of the rule and extend to the law pertinent to the rule as well. This is a vital distinction in this case because the law pertinent to the rule is instructive of the state's interest, or lack thereof, for creating such a rule.

As seen when analyzing the laws pertinent to OAR 580-002-0045(3), there is no government interest for the rule because it directly conflicts with the actual, expressly stated, government interest. The Legislature has already extensively explored and expressly stated the government's interests in the areas of concealed handguns licenses and firearms on university campuses. *See* ORS 166.170; *See also* ORS 166.291; *See also* ORS 166.370. OAR 580-022-0045(3), despite any possible justification for it, expressly contradicts the government interests expressly codified by the Legislature. Though the strict scrutiny review is usually applied relating to fundamental rights, OAR 580-022-0045(3) is incapable of passing any standard of review because, as explained above, there is no government interest for the rule.

Respondents' assertion that OAR 580-022-0045(3) is presumptively lawful is not a persuasive argument. There is no legal basis for any such legal presumption. It is true that the court in *Heller* recognized that the Second Amendment does not allow an individual to carry a weapon in any manner whatsoever for whatever purpose, and even referenced restrictions on carrying firearms in sensitive places. *District of Columbia v. Heller*, 128 S Ct at 2816-2817. However, the court did not create a legal presumption that such restrictions are constitutional.⁴ Therefore, this court should not now read some presumption into the Supreme Court's holding.

⁴ Respondents' reference to a case footnote does not rise to the level of creating a legal presumption of constitutionality.

Respondents' argument that they should be afforded substantial constitutional deference in their ability to administer their own property is largely moot. First, OAR 580-002-0045(3) did not flow from Respondents' ability to manage their property, but rather was derived from Respondents' authority to regulate as granted in ORS 351.070. Second, in this circumstance the Oregon Revised Statutes have made clear the intent on how state property should be regulated as it pertains to firearms, concealed handgun licenses, and firearms on college and university campuses. Any deference given to the government to administer their property cannot extend so far as to completely circumvent state law. If it did, then state agencies could continually run afoul of state law while hiding behind such deference to justify their actions. Therefore, any deference applied by the federal courts in other cases cannot now be used in the present matter to justify the direct conflict between OAR 580-022-0045(3) and the practical nature and intent of state law.

CONCLUSION

This court should declare OAR 580-022-0045(3) to be invalid because the Board exceeded its statutory authority and the rule violates constitutional provisions.

DATED this 12th day of August, 2010.

ADAMS, DAY & HILL.

VANCE D. DAY, OSB# 912487
Adams Day & Hill
339 Washington St. SE
Salem, OR 97302
Attorney for Petitioner

CERTIFICATE OF FILING AND SERVICE

I certify that on August 12, 2010, I filed, by hand delivery, the original and 13 copies of the foregoing **PETITIONER'S REPLY BRIEF** with the following:

State Court Administrator
Appellate Court Records Section
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

I certify that on August 12, 2010, I served two true and correct copies of the foregoing **PETITIONER'S REPLY BRIEF** in a sealed envelope sent by regular first class mail on each of the following persons:

James N. Westwood, OSB No. 743392
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204
Telephone: (503) 224-3380
Attorney for Respondents

ADAMS, DAY, HILL.



VANCE D. DAY, OSB# 912487
Adams Day & Hill
339 Washington St. SE
Salem, OR 97302
(503) 399-2667
Attorney for Petitioner