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Nicholas Gier
Secretary of the Faculty Union
University of Idaho

Dear Nick,

Here is the memo addressing the question of whether faculty members have any options to keep guns out of their classrooms in light of Idaho's new law. I have included some background information on gun regulations as well as background information on the University of Idaho. I also compiled a list of some of the legal remedies that I felt would be most likely to come up in relation to this new gun law. Finally, I listed some other non-legal options that faculty may choose to pursue.

Please be aware that some of the legal issues you asked me to address are very nuanced and could take many more hours of research before any definitive answer could be reached. I tried to include as much as I could within the time given, but I have noted below where additional research might be necessary.

For the sake of time and brevity, I have omitted full legal citations. If you would like a full citation for any of the material referenced please contact me and I would be happy to provide it to you.

I use the following abbreviations throughout the memo: Faculty and Staff Handbook (FSH); Administrative Procedures Manual (APM); State Board of Education Policies and Procedures (BOE P&P); Idaho Code (I.C.). The words "law" and "statute" and "legislation" are used interchangeably.

If you have any further questions, please don't hesitate to contact me.

Sincerely,



Benjamin Onosko

I. BACKGROUND INFORMATION ON FIREARMS

To help get non-lawyers up to speed on the intricacies of gun laws I have included relevant constitutional provisions, statutes and court decisions relating to firearms. I have also included the new Idaho law which prohibits universities from regulating firearms.

1. United States Constitution, Amendment II: The Second Amendment reads:

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

The U.S. Supreme Court has only examined the Second Amendment in a handful of cases. While the Court has not laid out the full contours of what exactly this amendment protects, it has given some limited guidance.

In *United States v. Miller*, 307 U.S. 174, the Supreme Court held that Congress does have the power to regulate and even prohibit certain types of firearms.

In *District of Columbia v. Heller*, 128 S. Ct. 2783, the Supreme Court struck down a District of Columbia law that prohibited citizens from possessing handguns in their homes. The Court explicitly stated that the Second Amendment guarantees a person the right to "use arms in defense of hearth and home." This holding was extremely limited. The case merely holds that the Second Amendment allows a citizen to possess handguns within the home for purposes of self defense. However, the Court also made this enlightening comment:

Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, **or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings**, or laws imposing conditions and qualifications on the commercial sale of arms.

The Supreme Court reaffirmed its *Heller* decision two years later in *McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020. The Court in *McDonald* just reiterated that its holding in *Heller* does apply to state governments. The Court again stated that its holding should not be construed as forbidding laws prohibiting firearms in sensitive places such as schools.

2. Idaho Constitution, Article I, Section 11: Idaho's "Second Amendment" reads:

The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the

passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.

Idaho Courts have never conducted an in-depth examination of Idaho's "Second Amendment." The following cases provide some guidance on the Idaho Constitution.

In the case of *In Re Brickey*, 8 Idaho 597, the Court struck down a city ordinance that prohibited all firearms within the city. The Court said, "the legislature has no power to prohibit a citizen from bearing arms in any portion of the state of Idaho, whether within or without the corporate limits of cities, towns, and villages."

The Court later recognized some limits on the right to bear arms. In *State v. Woodward*, 58 Idaho 385, the Court held that while the legislature cannot flat-out ban citizens from possessing firearms, it can regulate firearms. The Court said, "the Legislature only has the power to 'regulate the exercise of this right'; that is, among other things, it may prohibit carrying concealed weapons, or prescribe the kind or character of arms that may or may not be kept, carried, or used, and various other things of a regulatory character."

In *State v. Hart*, 66 Idaho 217, our Supreme Court said, "a statute prohibiting the carrying of concealed deadly weapons would be a proper exercise of the police power of the state."

I have been unable to find any other case law that further defines or explains the rights contained in Idaho's "Second Amendment." So, all we know about the Idaho "Second Amendment" is that it prohibits the legislature from completely banning firearms, but it does not prohibit the legislature from passing rules and regulations concerning firearms. Included in the legislature's power is the power to prohibit concealed weapons.

Note: While the U.S. Supreme Court appears to have said in *Heller* that regulations on guns in schools are permissible under the Second Amendment, that does not necessarily mean that such prohibitions are permissible under the Idaho Constitution's "Second Amendment." In theory, a law could be perfectly constitutional under the Second Amendment, but be unconstitutional under Idaho's "Second Amendment." Without further guidance from the Idaho Supreme Court, I am unable to determine whether a university's ban on firearms would violate Idaho's "Second Amendment."

However, Idaho law currently allows for firearm bans in public schools and most courthouses, including the Latah County Courthouse. Given that these similar prohibitions on firearms have never been challenged as being unconstitutional under the Idaho Constitution, my best educated guess is that a university ban on firearms would not violate Idaho's "Second Amendment."

3. Idaho Senate Bill 1254 (2014): This is the new Idaho law that you have asked me to research. The most relevant portion of this new legislation is the creation of I.C. 18-3309 which reads in part:

(1) The board of regents of the university of Idaho, the boards of trustees of the state colleges and universities, the board of professional-technical education and the boards of trustees of each of the community colleges established under chapter 21, title 33, Idaho Code, hereby have the authority to prescribe rules and regulations relating to firearms.

(2) Notwithstanding any other provision of state law, this authority shall not extend to regulating or prohibiting the otherwise lawful possession, carrying or transporting of firearms or ammunition by persons licensed under section 18-3302H or 18-3302K, Idaho Code.

(a) However, a person issued a license under the provisions of section 18-3302H or 18-3302K, Idaho Code, shall not carry a concealed weapon:

- (i) Within a student dormitory or residence hall; or
- (ii) Within any building of a public entertainment facility, provided that proper signage is conspicuously posted at each point of public ingress to the facility notifying attendees of any restriction on the possession of firearms in the facility during the game or event.

(b) As used in this section:

(i) "Public entertainment facility" means an arena, stadium, amphitheater, auditorium, theater or similar facility with a seating capacity of at least one thousand (1,000) persons that is owned or operated by the board of regents of the university of Idaho, a board of trustees of a state college or university, the state board of professional-technical education or a board of trustees of a community college established under chapter 21, title 33, Idaho Code, that is primarily designed and used for artistic, theatrical, cultural, charitable, musical, sporting or entertainment events, but does not include publicly accessible outdoor grounds or rights-of-way appurtenant to the facility, including parking lots within the facility used for the parking of motor vehicles.

(ii) "Student dormitory or residence hall" means a building owned or operated by the board of regents of the university of Idaho, a board of trustees of a state college or university, the state board of professional-technical education or a board of trustees of a community college established under chapter 21, title 33, Idaho Code, located on or within the campus area owned by the university or college to house persons residing on campus as students, but does not include off-campus housing or publicly accessible outdoor grounds or rights-of-way appurtenant to the building, including parking lots within the building used for the parking of motor vehicles.

.....

I.C. 18-3302H, referenced in subsection (2) above, is a licensing procedure which allows retired law enforcement officials to carry concealed weapons.

I.C. 18-3302K, referenced in subsection (2) above, is a licensing procedure which allows a person to obtain an "enhanced" concealed carry permit.

I.C. 18-3302, is a licensing procedure which allows a person to obtain a regular non-enhanced concealed carry permit.

So, what does this new law say. It starts out with subsection (1), which states that the University does in-fact have the authority to regulate firearms. However subsection (2) substantially modifies subsection (1).

Subsection (2) explains that if a person has obtained a permit under I.C. 18-3302H or 18-3302K, then the University cannot regulate that person's ability to possess, carry, or transport firearms or ammunition. The breadth of this subsection is quite extraordinary. If someone has obtained one of these permits, the University cannot prohibit them from carrying any legal firearm, with any legal ammunition, on any part of the University grounds (with the exceptions explained below.) Note that even though the permit is called an enhanced concealed carry permit, nothing in the law requires that the person actually conceal the weapon. Under the law a person who has one of these permits will be allowed to walk around campus and into classrooms with a gun in plain view, and the University cannot regulate this in any way.

This extends to all lawful weapons and ammunition. So if Idaho law allows people to possess shotguns, students can carry shotguns; if Idaho law allows automatic rifles, students can carry automatic rifles; if Idaho law allows for armor piercing bullets, then students can openly carry their AK-47 with armor piercing bullets into any classroom on campus!

The legislature only put two limitations on subsection (2). First, these permits do not allow people to carry firearms in student dormitories or residence halls. Second, these permits do not allow people to carry firearms in public entertainment facilities. Notice also that the limitations in subsection (2)(a) only prohibit a person from bringing a "concealed weapon" into these buildings. It says nothing about prohibiting a person from open carrying in dormitories or public entertainment facilities.

This brings us back to subsection (1). Subsection (1) gives the University the power to regulate firearms and ammunition for anyone who does not possess a permit under I.C. 18-3302H or 18-3302K. So, if a person has no concealed carry permit, the University can prohibit him from carrying any weapon, concealed or not, on campus grounds. Additionally, even if a person does have a concealed carry permit, but it is only a regular concealed carry permit under I.C. 18-3302, the University can still prohibit him from carrying any weapon, concealed or not, on campus grounds.

As an interesting aside, subsection (2) only prohibits regulations regarding firearms and ammunition. So the University still retains the right to prohibit anyone, including people licensed under I.C. 18-3303H and 3302K, from carrying weapons on campus as long as the weapons being prohibited aren't firearms. This leads to the strange result that the University may lawfully prohibit students from carrying pocket knives into classrooms, but the University has no authority to prohibit students from carrying assault rifles into classrooms.

Note: Because this new law has not yet gone into effect no court in Idaho has examined its contours. The above analysis is based purely on my reading of the plain language of the statute.

4. Idaho Code 18-3301 et. al.: Most other Idaho laws relating to the possession of firearms can be found at I.C. 18-3301 et. al. The majority of these are not relevant to this memo.

II. BACKGROUND INFORMATION ON THE UNIVERSITY OF IDAHO

The University of Idaho holds a special place in Idaho law as compared to every other University in the State. The following should help get non-lawyers up to speed on some of the unique features of the University of Idaho.

1. Creation of the University: The University of Idaho was created in 1889 by an Act of the Territorial Legislature. Thus, the University was already in existence prior to Idaho's admission to the Union. The following sections of that Territorial Act are relevant to this memo:

Section 1: There is hereby established in this Territory, at the town of Mascon, (sic) in the County of Latah, an institution of learning, by the name and style of "The University of Idaho."

Section 2: The government of the University shall vest in a Board of Regents....

Section 3: The Board of Regents and their successors in office, shall constitute a body corporate, by the name of "Regents of the University of Idaho," and shall possess all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law, and shall have the custody of the books, records, buildings and other property of said University....

Section 5: The Board of Regents shall enact laws for the government of the University in all its branches...The Board may prescribe rules and regulations for the management of the libraries, cabinet, museum, laboratories and all other property of the University.

Section 8: ...The immediate government of the University shall be intrusted (sic) to the Faculty...

This Territorial Act was adopted into the Idaho Constitution, so these provisions are still good law.

2. Idaho Constitution, Article 9, Section 10: In 1890, Idaho was admitted to the Union and adopted its own Constitution. Article 9, Section 10, of the Idaho Constitution currently reads:

The location of the University of Idaho, as established by existing laws, is hereby confirmed. All the rights, immunities, franchises, and endowments, heretofore granted thereto by the territory of Idaho are hereby perpetuated unto the said university. The regents shall have the general supervision of the university, and the control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law. The regents may impose rates of tuition and fees on all students enrolled in the university as authorized by law. No university lands shall be sold for less than ten dollars per acre, and in subdivisions

not to exceed one hundred and sixty acres, to any one person, company or corporation.

By choosing to include the University of Idaho within its Constitution Idaho gave the University inherent powers that most other Universities do not enjoy. For example, Florida's Universities were established by statute and not by constitution.

Here is a hypothetical example of how this difference can come into play. Florida's statute that creates the University of Florida says "the University shall be located in Miami", whereas Idaho's constitution says "the University shall be located in Moscow." If the Florida legislature wants to move the college to Tallahassee all it has to do is pass a new law saying the University shall be located in Tallahassee. In contrast, if the Idaho legislature wanted to move the University to Boise it could not just pass a law saying the University shall be located in Boise. The Idaho legislature would have to amend the Idaho Constitution itself, which is a much more difficult and complicated process. Article 20, Section 1, of the Idaho Constitution explains that a constitutional amendment requires approval by two-thirds of each house, as well as a vote by the electors of the State. By including the University in its Constitution, Idaho has, to some extent, placed the University on equal footing with the legislative, executive, and judicial branches of government.

It is also important to note that Article 9, Section 10 gives the University all the rights, immunities, franchises, and endowments, heretofore granted by the territory. Thus, all the powers and privileges the University exercised and enjoyed before Idaho joined the Union remain with the University unless the Constitution provides otherwise.

3. Case Law: Several cases from the early 20th century suggest that the University retains broad powers from its territorial days.

In *Black v. State Board of Education*, 33 Idaho 415, the State Board of Examiners (another Constitutional entity under Article 4, Section 18), sought to compel the University to turn over money from the sale of some old university boilers. Idaho's Constitution gives the State Board of Examiners the power to "examine all claims against the state." The legislature also passed a bill that directed the University to turn over funds from the sale of any university property to the State. The University refused, and passed a resolution clearly stating that it did not believe the executive or legislative branches had the constitutional power to compel it to turn over these funds. The *Black* Court first explained that "a claim against the regents is not a claim against the state." This reinforces the idea that the University is a separate entity unto itself. The Court further clarified:

The board of regents is a constitutional corporation with granted powers, and while functioning within the scope of its authority, **is not subject to the control or supervision of any other branch, board or department of the state government, but is a separate entity**, and may sue and be sued, with power to contract and discharge indebtedness, with the right to exercise its discretion within the powers granted...

To hold that [Article 4, Section 18], of the constitution and C.S. sec. 242, confer upon the board of examiners power to pass upon claims against the board of regents would make the latter board subservient to the former, and in the final analysis would operate to deprive the board of regents of the control and direction of the funds of and appropriations to the university.

The Court further stated that any law passed by the legislature concerning the supervision of the University or the control of its funds "must not be of a character to interfere essentially with the constitutional discretion of the board, under the authority granted by the constitution." The *Black* case confirmed that the University has control over its own funds, that this power comes from the constitution and the executive and legislative branches cannot override this power.

In *State v. Robinson*, 83 P.2d 983, a similar issue as that raised in *Black* was raised by the State Industrial Accident Board. The Accident Board also asked the Court to rule that it did not have to present claims to the Board of Examiners. However, the Court ruled that the Accident Board did have to present its claims to the Board of Examiners because "the Accident Board is a statutory, not a constitutional body." In passing, the *Robinson* Court also commented that the Board of Regents is a "constitutional corporation," and is "the highest form of juristic person known to the law and of independent authority." Thus, the *Robinson* case distinguished a statutorily created body, like the Accident Board, from a constitutionally created body, like the Board of Regents.

In *Wright v. Callahan*, 61 Idaho 167, the legislature attempted to create the office of state controller. However, the Idaho Constitution had already created a state auditor. The Court held that the legislature had no power to create the office of controller because it was an attempt to take away powers that the Constitution already gave to the state auditor. Quoting from other case law the Court said, "when the constitution devolves a duty upon one officer the legislature cannot substitute another." This case further supports the proposition that the Idaho legislature cannot override powers given in the Constitution simply by passing new laws.

Finally, in *Dreps v. Board of Regents*, 139 Pac. 2d 467, the Supreme Court repeatedly emphasized the inherent powers of the Board of Regents. In *Dreps*, the Board of Regents appointed a nurse who also happened to be related to a member of the board. Under normal circumstances this would have violated Idaho's Nepotism Act. The University later sought to withhold payment from Ms. Dreps, arguing that the Nepotism Act should apply to the University. The Supreme Court considered whether this law, the Nepotism Act, could be applied to the University of Idaho. The Court first looked at the Idaho Constitution:

"All the rights, immunities, franchises, and endowments, heretofore granted thereto by the territory of Idaho are hereby perpetuated unto the said university". By this provision, the territorial act, creating the university and prescribing the powers, duties and authority of the Board of Regents, was written into the constitutional corporate charter of the university as fully as if it had been set out at length in the constitution. **Its**

rights, immunities, franchises and endowments were placed definitely and permanently beyond the power of the legislature to disturb, limit or interfere with them.

The Court then examined what powers the University retains under the Constitution:

It is true the university is “under the exclusive control of the state” but that does not make it a department of *state government* or subordinate to the legislature.

[The University] received its charter and authority from the people at the same time and in the same manner the legislature was created, **each independent and exclusive of the other in the sphere of its own purpose and objects.**

In considering the powers and authority of the legislature in this respect, as compared with the power and authority of the Board of Regents, we must bear in mind that each gets its authority direct from the people and each is created by the constitution itself, so that the one has no authority over the other, unless it is specifically so granted by the constitution under which each was created.

Finally, the Court cited approvingly to a Minnesota case discussing the powers of the University of Minnesota (which has a constitutional provision almost identical to Idaho's):

The language has a definite legal import; the terms are those of confirmation in perpetuity of a prior grant of corporate rights **So the University, in respect to its corporate status and government, was put beyond the power of the Legislature by paramount law, the right to amend or repeal which exists only in the people themselves.**

The *Dreps* case clearly shows that the Idaho legislature cannot pass laws taking away powers the University was given under the Constitution. This holding is also remarkable because the University itself was asking the Court to hold that the law applied to it.

Several other states that provide for a university in their constitutions have dealt with similar issues. In Colorado and Michigan, courts have held that the legislature cannot change the location of the state university absent a constitutional amendment. *People v. Regents of Colorado*, 49 Pac. 286; *Sterling v. Regents of University of Michigan*, 68 N.W. 253. In the Michigan case, the Court eloquently explained why a Board of Regents, rather than the legislature, should have full power and control over state universities:

No state institution in America has prospered as well as independent colleges, with equal, and often with less, means. Why they have not may be ascribed, in part, to the following causes: They have not been guided by

that oneness of purpose and singleness of aim (essential to their prosperity) that others have whose trustees are a permanent body,—men chosen for their supposed fitness for that very office, and who, having become acquainted with their duties, can and are disposed to pursue a steady course, which inspires confidence and insures success, to the extent of their limited means. State institutions, on the contrary, have fallen into the hands of the several legislatures, fluctuating bodies of men, chosen with reference to their supposed qualifications for other duties than cherishing literary institutions. When legislatures have legislated directly for colleges, their measures have been as fluctuating as the changing materials of which the legislatures were composed. When they have acted through a board of trustees, under the show of giving a representation to all, they have appointed men of such dissimilar and discordant characters and views that they never could act in concert; so that, whilst supposed to act for and represent everybody, they, in fact, have not and could not act for anybody.

In Minnesota, courts have held that the decision whether to build on campus is one of the powers inherently retained by the university. *Fanning v. University of Minnesota*, 236 N.W. 217.

In contrast to these states, Florida's universities were created by statute. Florida courts have said that the legislature can abolish universities and their boards of trustees and create new ones. "These universities...are subject to change and modification by the legislature." *State v. Bryan*, 39 So. 929. This case highlights an important contrast between universities created by statute, and those created by a constitution.

One case out of Utah appears to be the most factually similar to the case at hand. In *University of Utah v. Shurleff*, 144 P.3d 1109, the University of Utah challenged a state law very similar to Idaho's new law. The university argued that it had the constitutional authority to prohibit firearms on campus. The constitutional provision establishing the University of Utah reads:

The general control and supervision of the higher education system shall be provided for by statute. All rights, immunities, franchises, and endowments originally established or recognized by the constitution for any public university or college are confirmed.

Utah Const. art. X, § 4. The Court in *Shurleff* ultimately held that the Utah Constitution does not restrict the legislature's power to control firearms on campus, even when the university objects. However, the Court took the time to contrast Utah's Constitution with the constitutional provisions of other states. The Court said, "our prior case law construing article X, section 4 has consistently upheld the power of the legislature to exercise 'general control and supervision' over higher education, including the University." The Court even commented on Idaho's Constitutional provision establishing the University of Idaho:

The *Board of Examiners* opinion distinguished Utah's constitutional language from that of other states whose constitutions vest their institutions of higher learning with the institutional autonomy the University seeks.

That the framers of the Utah Constitution did not adopt language similar to the constitutions of Minnesota and Idaho, even though the convention had before it the constitutions of those states is evidence that a different result was intended

While *Shurleff* reached a conclusion which we seek to avoid, it is a good sign that the Court distinguished the University of Utah from the University of Idaho. This leaves room for argument that the University of Idaho is more autonomous than the University of Utah, and thus should have the power to regulate firearms on campus.

III. IS THE NEW LAW CONSTITUTIONAL AS APPLIED TO THE UNIVERSITY OF IDAHO

While I have not had time to conduct a full investigation of relevant case law from surrounding jurisdictions, I believe that the University of Idaho has a strong argument that this new law is unconstitutional as applied to it, and that it cannot be enforced against the University of Idaho.

First, both the Territorial Act and Article 9, Section 10 of the Idaho Constitution appear to grant the University broad powers. Both documents speak broadly of rights and powers of the University. While it could be argued that the Constitution does contain some limiting language, "under such regulations as may be prescribed by law," both the *Black* and *Dreps* cases have interpreted this sentence very narrowly.

Second, a vast majority of the Idaho case law I have found reinforces the idea that the University retains broad powers. Courts have upheld the University's inherent power to collect and manage funds, represent itself in court, dispose of funds as it sees fit, dispose of land as it sees fit, employ who it chooses and to not be bound by legislation that encroaches on its powers. The *Black* and *Dreps* cases are similar in several respects to your case. In *Black*, just like here, the legislature passed a law directly aimed at the University. The Court held that this was not enough to take away the University's inherent powers. In *Dreps*, the University pleaded with the Court to hold that legislation did apply to it. The Court held that even if the University wants a law to apply to it, the law will not apply if it encroaches on a power reserved to the University. I have yet to find a case that seriously limits or discusses limitations on the University.

Third, case law from other states with constitutional provisions similar to Idaho's also grant broad power to their universities. Michigan, Minnesota and Colorado all have universities created by their constitutions. While I have not had time to fully research case law from these jurisdictions, a preliminary look has indicated that they too place special significance on the fact that the universities are constitutional creations. Additionally, Michigan and Minnesota courts have cited to Idaho case law in support of their expansive view of university powers. In turn, Idaho Courts have also cited to Michigan and Minnesota case law in support of broad powers for the University of Idaho.

Fourth, case law from states that do not have constitutional provisions similar to Idaho, Michigan, Minnesota or Colorado appear to limit the power of their universities and tend to give that power to the legislature. In Florida, the legislature has been held to have the power to completely dissolve a university and its board of trustees. In Utah, the *Shurleff* court found that Utah's Constitution gives the legislature the power to generally manage "ALL" aspects of the university. The case law from these states also tends to distinguish its universities from the universities in states like Idaho or Michigan, where it is generally recognized that the universities retain broader powers.

Finally, the Supreme Court of the United States has recognized the validity of "longstanding" prohibitions on firearms in high risk areas such as schools.

For all of these reasons I believe that the University of Idaho has the constitutional authority to regulate firearms on its campus. Because the University retains this power, I believe that I.C. 18-3309 is unconstitutional as applied to the University of Idaho.

IV. LEGAL REMEDIES

You have asked me to examine what legal remedies may be pursued in order to stop guns from getting into classrooms. Below is a non-exhaustive list of legal actions that could be taken.

1. Suit by the University Challenging Law: As I indicated above, I believe that this new law cannot be constitutionally applied to the University of Idaho. For that reason, I would urge the University to keep its current firearms regulations in place. These can be found at FSH 2300 and APM 35.35. The University could continue to enforce its policies until sued by the State. At that point, a Court will determine whether this new law is constitutional or not.

Given your current situation, this would be the best possible legal action to accomplish your goals.

2. Suit by Faculty Challenging Law: Even though I believe that this new law is unconstitutional, that fact alone does not necessarily give the University's faculty, staff or students legal standing to challenge the law. Because of time restraints, I have not been able to fully research whether University faculty would have legal standing (which is necessary to file a lawsuit) to challenge this law.

Even assuming that University faculty have standing to challenge the law, this option is not as attractive as a suit by the University for the following reason. If the University does not challenge the law, it is likely the University will amend its FSH and APM to allow guns on campus. If the University amends its FSH and APM to allow guns, then the result of any faculty lawsuit would be rendered moot. Even if the law is ultimately held to be unconstitutional, there would be nothing unconstitutional about the University allowing firearms on campus. Thus, even a successful lawsuit by the faculty could be rendered moot if the University itself chooses to allow guns on campus.

Note: I have been unable to find any solid arguments that a University's own choice to allow guns on campus could be considered unconstitutional. While it is certainly possible that there are constitutional arguments to be made vis-a-vis concepts of Academic Freedom or the First or Fourteenth Amendments, I would need to undertake a much more exhaustive search before I could give you guidance on such issues.

3. Contract by the University: The Idaho Supreme Court has held that education is not a "fundamental right." *Idaho Schools for Equal Educ. Opportunity v. Evans*, 850 P.2d 724. Additionally, the Idaho Supreme Court has said that "the principal relationship between a college and its students is contractual." *George v. University of Idaho*, 822 P. 2d 549.

Even if the University does not challenge the new law it could still attempt to keep guns out of classrooms by contract. If the University required students to sign a contract which explicitly conditions acceptance to the University upon students agreeing to not bring guns into classrooms, or agreeing to be bound by any professor's decision on what materials may enter a classroom, then the University can keep guns out of classrooms without violating the new law. Alternatively, the University could require students to agree to not obtain a license under I.C. 18-3302K.

However, not all contracts are legal or enforceable. Agreements which violate public policy or law are sometimes held to be illegal contracts. If a contract is held to be illegal Courts will generally refuse to enforce it.

Note: This new law is quite unique. I have been unable to find an illegal contract case where a law, similar in either form or substance to this law, was violated. At this point in time I am unable to render an opinion as to whether such a contract between the University and a student would be legal or not. Before any such action is taken I would recommend that a much more detailed analysis of illegal contract issues be undertaken.

4. Suit by Faculty against University for Violation of Contract: If the University does change its policies to allow firearms in classrooms, the faculty may want to sue the University for breach of contract. The relationship between the faculty and the University is one of contract. While I have not been provided a sample contract between the University and a faculty member, I do know that provisions of the FSH and APM are incorporated into any contract between the University and faculty members. If the University decides to allow guns in the classroom, the following provisions of the FSH and APM might arguably be violated (my personal comments are italicized):

FSH Section 1320 E-1 (f): The University will: Foster an academic environment conducive to the students' mental, physical, and social development and well-being. *(This provision is arguably violated because guns in classrooms do not foster students' mental or physical well being. It introduces risk and uncertainty into the classroom.)*

FSH Section 1520 Art. IV, Section 9: Subject to the authority of the president and the general supervision and ultimate authority of the regents, the university faculty accepts its responsibilities for the immediate government of the university, including, but not restricted to:

The university faculty recommends general policies and procedures concerning the welfare of faculty members, including, but not limited to, appointment, reappointment, nonreappointment, academic freedom, tenure, working conditions, promotions, salaries, leaves, fringe benefits, periodic evaluations, performance reviews, reassignment, layoff, and dismissal or termination.

(The faculty have a duty to recommend policies concerning the welfare of faculty members. Again, I believe that a policy of allowing guns in classrooms would detract from faculty welfare in several respects.)

FSH Section 2300 Art. VI, Section 1: As in any community, certain forms of responsible conduct must be adhered to in order to ensure the physical functioning and safety or security of that community.

(Allowing guns in the classroom would be conduct that detracts from safety and security of the University community.)

FSH Section 3160 (A): The Board of Regents has affirmed its beliefs that academic freedom is essential for the protection of the rights of faculty members in teaching and of students in learning; that freedom in research and teaching is fundamental to the advancement of truth; that, therefore, academic freedom should not be abridged or abused; and that academic freedom carries with it responsibilities correlative with rights. *(I have not found any pertinent rules, regulations, or cases that delineate exactly what academic freedom is, but it could certainly be argued that taking away a teacher's right to control what objects and materials are brought into her classroom, especially when those objects are deadly weapons, would violate some of the teacher's academic freedom.)*

APM Section 35.32 A-2: Administrators, managers and supervisors are responsible for developing and implementing safe work practices, promoting safety, and setting the example for others. All employees are expected to adhere to safe operating work practices and are encouraged to provide expertise and offer ideas to make safety a part of the job. All members of the University community are expected to continuously promote safety awareness, maintain property and equipment in safe operating condition

APM Section 35.32 A-4: Deans, directors, department heads, faculty members, staff and other supervisory personnel are responsible for providing safe environments and operations under their control (including, but not limited to, work, classroom, laboratory, and field-trip activities), and are required to ensure that all reasonable and necessary precautions are taken to prevent accidents and to preserve the life and health of the employees, instructors, students and others under their supervision. Supervisors are responsible for ensuring that employees under their supervision are adequately trained, equipped, monitored, evaluated, and guided as appropriate to ensure compliance with established safety policies, standards, and procedures. Annual performance evaluations of supervisors shall reflect performance in promoting safe work practices.

APM Section 35.32 A-5: All University employees are required to comply with the safety policies, procedures, and work practices established by the University. Employees must avoid any activity that creates or constitutes a serious hazard to themselves or others while working for the University. Any employee who believes that performing an

assigned work task or activity may pose a serious risk to life or health is expected to immediately bring their concerns to the attention of his or her supervisor, or others as designated by department/division procedures.

(These Sections all indicate that administrators, faculty, and staff have a responsibility to ensure the safety of other members of the University. If guns in a classroom present a risk to any member of the University, which they clearly do, then you have an obligation to do something about it.)

APM Section 35.33 A-1: The president is charged with the responsibility and authority for maintaining order and providing for the safety and well-being of everyone who is admitted to, enrolled in, employed by, or associated with the UI.

APM Section 35.33 A-2: Deans, directors, department heads, and other supervisory personnel are responsible to ensure that each person reporting to them has the training and experience necessary to conduct assigned work activities in a safe and prudent manner. Employees must be furnished with appropriate safety equipment, devices, and safeguards and are required to adopt and use the practices, methods, operations, and processes that are provided to render the workplace safe.

(These sections lay out the administration's responsibility to ensure a safe environment. More interestingly, they also indicate that faculty should be trained and equipped to deal with safety issues. If students now have guns in the classroom, all faculty should receive instruction on handling of firearms. Additionally, because the Legislature and University are of the mindset that having guns in a classroom increases safety, it logically follows that faculty must be provided their own guns in order to ensure safety in classrooms.)

APM Section 35.34 A-1 (e): Except in the case of law enforcement officers engaged in official duties, explosive substances are prohibited on university premises unless the university safety officer approves their use.

(Ammunition contains gunpowder which is clearly an "explosive substance." Allowing ammunition on campus would violate this provision.)

I.C. Section 33-3716: (3) No person shall willfully refuse or fail to leave the property of, or any building or other facility owned, operated, or controlled by the governing board of any such institution of higher education upon being requested to do so by the chief administrative officer, his designee charged with maintaining order on the campus and in its facilities, or a dean of such college or university, if such person is committing, threatens to commit, or incites others to commit, any act which would disrupt, impair, interfere with, or obstruct the lawful missions, processes, procedures, or functions of the institution.

(This section makes it a misdemeanor for a student to refuse to leave a classroom when ordered to. However, it is unclear whether a request to leave because of firearm possession would have to be honored in light of the new law.)

Any suit based upon breach of contract would be very specific to the facts of the case. Because this new law has not yet gone into effect, and because the University has not yet changed its policies to allow guns in the classroom, there is no factual basis for

me to analyze. Without facts specific to a case it is very difficult to give you an answer as to whether or not such a suit might be viable.

Note: As stated above, I would need to see an example of a faculty member's contract before I could determine whether any of the specific terms in the contract would be violated by the University allowing guns in classrooms. Additionally, I would need to see how exactly the University amends its policies to allow for guns in classrooms.

5. Suit by Faculty against University for Violations of Employment law: There are numerous reasons why an employee may wish to sue an employer besides simple breach of contract. The field of employment law covers a wide range of circumstances and protects a wide range of employee behavior. However, a suit under employment law principals generally requires that there first be an "adverse employment action." That is, an employee must usually have suffered some harm because of an employer's wrongful actions. For example, getting fired, demoted or transferred can constitute an adverse employment action.

At this point in time it does not appear there have been any "adverse employment actions." Until a member of the faculty is disciplined in some respect for a violation of this new law or a new University policy, it is very difficult for me to render any meaningful legal analysis. Without specific facts it is too early to tell you whether or not you may have a claim for a violation of some employment law statute.

Note: It is conceivable that a faculty member may wish to bring an employment law claim arguing that being forced to work with guns in the classroom does constitute an "adverse employment action." At this time, I have been unable to find any cases which could support such an argument. A great deal of additional research would be required before I could determine whether such an argument might be viable.

V. NON-LEGAL OPTIONS

In addition to the legal avenues available, there are other non-legal avenues which you may choose to pursue to try and stop or slow the bringing of guns into classrooms. It is important to note that I am not recommending you pursue any of these options, they are just thoughts that I believe you may find attractive.

1. Change the Law: This new law is a simple piece of legislation, and like all legislation, it can easily be changed by the next legislature. If you have the motivation and organization, you can attempt to get the Idaho legislature to repeal or modify this law.

2. Ask for Help from University Committees: Several University Committees appear to be directly impacted by this law. I would suggest you bring your concerns to these committees and see if they can offer any help or advise:

A. The Faculty Affairs Committee, whose duties include: "Conduct[ing] a continuing study of salaries, professional problems, welfare, retirement options and benefits (including 403b plans), and working conditions of faculty members."

FSH 1640.42

B. The Safety and Loss Control Committee, whose duties include: "Promot[ing] policies and programs that will provide a safe and healthy working and living environment for university students, employees, and members of the public, and that will protect public property from injury or damage."

FSH 1640.76.

C. The Staff Affairs Committee, whose duties include: "Study[ing] issues, problems, welfare, and working conditions of staff." **FSH 1800 Art. II, Section 2.**

3. Ask for Help from OSHA: OSHA is the federal Occupational Safety and Health Administration. OSHA sets certain standards that certain employers must follow in order to ensure a safe working environment for employees. OSHA has the authority to do on-site visits to determine whether OSHA standards are being followed. In Idaho, OSHA only applies to private businesses and certain federal employees. State and local government employees are not covered.

The case law in Idaho is quite muddled with regard to whether the University of Idaho would be considered part of the "State" for purposes of OSHA. However, my best guess is that a Court would find that OSHA does not apply to University of Idaho employees. That being said, it may be worth while to call the local OSHA office in Boise and inquire. (208) 321-2960.

4. Modify your Contract: As stated above, your relationship with the University is primarily one of contract. You could certainly attempt to have your contracts modified to include a provision giving faculty control over their classrooms. Here is an example of what such language might look like: "The University gives each faculty member the right to control his/her classroom while teaching in it. While a faculty member is teaching, he/she retains the right to control what objects and materials students may bring into the classroom."

5. Put up No-Gun Signs: Any faculty member wishing to keep guns out of her classroom may wish to put up a sign on the door announcing that firearms are not allowed in the classroom. While this would not change the law or the University's policies and would not give faculty the right to take any action against any students, it may have the effect of promoting voluntary compliance among students. While no student could be forced to not bring a gun into class, some students may choose to comply with their professor's wishes.

6. Change Classrooms: The new law explicitly prohibits firearms in student dormitories, residence halls, and public entertainment facilities. Because this law is new, these terms are open to interpretation. It may be worth while to investigate what building on campus could arguably fall within these definitions. Faculty could then choose to hold class in one of those buildings to ensure that students with guns are not allowed in.

7. On-Line Classes: If a faculty member learns that students will be carrying guns in his classroom, that faculty member may wish to teach the class on-line rather than put himself in the dangerous position of being in closed quarters with gun toting students. I have not done any research on the University's policies concerning when a class may be taught on-line. However, if it does not violate any policy, faculty may choose to teach a class on-line rather than in the classroom.

8. Bring Guns to Class: If all else fails, faculty may wish to organize in what might be termed a show of civil disobedience. Faculty could choose to carry guns themselves into classrooms to highlight the absurdity of this new law. In order to garner the most attention, I would recommend that faculty choose to open-carry their firearms. Rifles and shotguns slung over the shoulder might have the most impact. Additionally, some complementary garb such as coonskin hats and boots with spurs could help hearken back to the 19th century when laws such as this might have been rational.

Before any faculty member chooses to carry a firearm on campus they need to make sure to obtain a license under I.C. 18-3302K.

Caution: Should the faculty choose to engage in any of these non-legal options or any other acts of civil disobedience, I would urge caution. Below is a list of rules and regulations that faculty members run the risk of violating should they choose to take any non-legal action:

FSH Section 1460 A-2: University policies are subject to compliance with laws and regulations instituted by higher governing authorities in the following order of hierarchy:

1. Federal laws and regulations
2. State laws and regulations

(If the new law is not challenged, or if it is challenged and upheld, this new law will control over any conflicting University policies.)

FSH Section 3170 B-1: The university must operate with integrity that includes, but is not limited to, operating in compliance with laws and regulations and its contractual obligations.

FSH Section 3170 B-2: Employees are responsible for becoming familiar with the laws and regulations pertinent to their areas of responsibility. Many but not all legal requirements are embodied in university policies. Failure to comply with laws and regulations can have serious adverse consequences both for the individuals and for the university, in terms of reputation, finances, and the health and safety of the community. *(Again, if the new law can be validly applied to the University of Idaho, any attempt to regulate guns in classrooms would violate State law.)*

FSH Section 3810 (A), (D): It is a violation of University policy for any employee to engage in retaliatory conduct, which includes conduct that intimidates, threatens, coerces, or retaliates against any individual because that individual reports a perceived wrongdoing, inequity, or violation of law or UI policy, files a complaint alleging illegal or prohibited discrimination, participates in a grievance or appeals procedure, or

participates in a dispute resolution through Human Resources or the Office of the Ombuds.

The university may discipline an employee who engages in retaliatory conduct as described in section A above up to and including termination.

(If a faculty member were to try and remove a student from class for possessing a firearm, or take any other action against that student purely for the reason that he possesses a firearm in the classroom, that action could arguably be called retaliation against the student for exercising a lawful right.)

FSH Section 3930 C-2: Specific examples of behaviors that constitute adequate cause for discipline up to and including dismissal are:

a. Failure to perform the duties and carry out the obligations imposed upon him or her by the state constitution, state statutes, or UI rules and regulations.

d. Refusal to accept a reasonable and proper assignment from an authorized superior.

(Assuming that faculty members attempt to regulate guns in their classroom without the support of the administration, these examples of "adequate cause for discipline" may or may not come into play.)

FSH Section 6230 (A): Employees may not exercise those political rights in UI's name, or through the use of UI facilities, stationery, forms, supplies, or services of any kind whatsoever, or in any way that might involve UI in partisan political activity or controversy.

(While I believe that the issue of guns in the classroom is primarily a safety concern, some might argue that it is a purely political issue. If that were the case, then faculty who support rational gun control could conceivably be held to be engaging in partisan politics.)

BOE P&P Section III, P (3): Students are entitled to an atmosphere conducive to learning and to fair and even treatment in all aspects of student-teacher relationships. Teaching faculty may not refuse to enroll or teach a student because of the student's beliefs or the possible uses to which the student may put the knowledge gained from the course. Students must not be forced by the authority inherent in the instructional role to make personal or political choices.

(As stated above, some might argue that gun control is a political issue, and any attempts by faculty to subvert a student's right to carry a gun could be seen as refusal to teach because of political beliefs.)

I.C. Section 33-3716: (1) No person shall, on the campus of any community college, junior college, college, or university in this state, hereinafter referred to as "institutions of higher education," or at or in any building or other facility owned, operated, or controlled by the governing board of any such institution of higher education, willfully deny to students, school officials, employees, and invitees:

(a) lawful freedom of movement on the campus;

(b) lawful use of property, facilities, or parts of any institution of higher education; or

(c) the right of lawful ingress and egress to the institution's physical facilities.

(2) No person shall, on the campus of any institution of higher education, or at or in any building or other facility owned, operated, or controlled by the governing board of any such institution, willfully impede the staff or faculty of such institution in the lawful performance of their duties, or willfully impede a student of such institution in the lawful pursuit of his educational activities, through the use of restraint, abduction, coercion, or intimidation, or when force and violence are present or threatened.

(If faculty attempt to prevent students with guns from entering classrooms, this provision of the Idaho Code could arguably come into play. A violation of this section is a misdemeanor, and would also violate University policies.)

I.C. Section 18-3303: Exhibition or use of deadly weapon. Every person who, not in necessary self-defense, in the presence of two (2) or more persons, draws or exhibits any deadly weapon in a rude, angry and threatening manner, or who, in any manner, unlawfully uses the same, in any fight or quarrel, is guilty of a misdemeanor.

(If any faculty member chooses to open carry a firearm, make sure that they do not do it in a "rude, angry, or threatening manner.")

VI. CONCLUSION

I believe that the most effective way to stop guns from getting into your classroom is for the University to stand up for its rights as a Constitutional entity and challenge the law or refuse to enforce it.

A suit by the faculty against the University also has potential for success, depending on the facts of the case. However, this option is less attractive because it could require that some adverse action be taken against a faculty member before the faculty member would have the right to sue.

Finally, while I sympathize with your plight and hope that you choose to pursue all non-legal options you can think of, non-legal options are not likely to achieve your desired result of prohibiting guns in classrooms. They do however afford faculty an opportunity to express their grievances and draw attention to their cause.