

Don, it looks like you have a fair grasp on the new law. You pointed out SB 1254 amended two criminal statutes and created a third. I just thought I would also point out to you that the Bill also created a fourth new law, I.C. § 5-343. I.C. § 5-343 states that a University cannot be sued for any "damages" that arise out of a University's policy allowing guns on campus. Hmmmmm, can you think of any damages that might possibly arise when people are allowed to have guns on campus? I just can't think of any damage that could be caused by having more guns on campus.

Don also makes a reference to not being able to have guns in stadiums that seat more than 1,000. However, this is not completely accurate. The new law only states that a person licensed under 18-3302K shall not carry a "concealed weapon" in a stadium that seats more than 1,000. The law does not say anything about prohibiting open carry inside a stadium. And, the paragraph immediately preceding this one says that the University shall have no authority to regulate the carrying of firearms by persons properly licensed. Thus, anyone who has this permit will be able to take his firearms into stadiums, as long as he carries openly.

Don argues that posting a no guns sign on a classroom door would violate the new law. This argument rests on the assumption that a no guns sign is a "regulation or prohibition" that actually keeps guns or students out of the classroom. But he has no basis upon which to make this assumption. First, I don't believe that you or I ever said in the article that by posting a no guns sign, professors thereby had the right to physically exclude students from the classroom. The sign is there to ask for students' compliance, not as a sign of intention to throw students out of the classroom if they do have a gun. Second, I think it is a real stretch to say that such a sign would be a "regulation or prohibition." The University's library has a sign on the front door asking students to be quiet. Is that a "regulation or prohibition" on free speech? Could the University be sued for violating students' First Amendment rights for posting such a sign? I'm sure that every time Don goes to a library he makes sure to be as loud as possible just to let everyone around him know that he has a right to free speech, and by-god he is going to exercise that right.

While it is possible that the County Prosecutor could bring a case charging a teacher with a violation of this law¹, I have a hard time believing that such a case would be brought simply for a teacher posting a sign indicating that they would prefer students not bring guns into the classroom. Even if we assume that Don's worst case scenario is correct, that teachers actually ban students from the classroom, I still think the Latah County Prosecutor is unlikely to bring criminal charges. In my opinion, the most likely repercussion for such a teacher would be sanctions by the University itself, not the County Prosecutor.

Don also points out that faculty members could risk violating state board of education policies by resisting the new law. First, to my knowledge these new regulations have not yet been created, so it is somewhat premature for him to assert that professors will be in violation of a policy that hasn't been created yet. Second, Don is mostly correct. If a

¹ In the past it was sometimes common for private citizens to initiate criminal cases by signing their own complaints, but this practice has fallen out of favor. In my estimation 99.99% of all criminal cases in Idaho are brought by prosecutors, not by private citizens.

University passes policies or regulations governing its employees, its employees will usually be bound by those policies. So, I guess we will have to just wait and see exactly what the new rules say before professors will be able to determine exactly what they can and cannot do.

While Don is mostly correct in his assertion that faculty could face sanctions from the University for violations of the University's policies, his constitutional analysis is completely off-base.

First, he claims that if a student with a gun is banned from a classroom, that student can and should file a federal civil rights lawsuit. Go for it Don! I hope you and that student have lots of money that you don't care about throwing away, because you will likely lose your federal rights lawsuit. I'm assuming that Don is talking about a suit under 42 U.S.C. § 1983. However, this section is normally used to ensure that FEDERAL laws and FEDERAL Constitutional rights are not violated.² I know of no Federal laws that prohibit a University or a faculty member from stopping students from bringing guns into a classroom. So, my best guess is that Don would be filing suit alleging that the student's Second Amendment right was violated. Let's examine that claim.

This is certainly an argument that could be made, however, I believe that the Supreme Court would disagree with him. In *District of Columbia v. Heller*, the United States Supreme Court said, "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.**" This is the Supreme Court interpreting the Second Amendment. The *Heller* and *McDonald* cases are the only two Supreme Court decisions affirming Second Amendment protections, and both of those cases only involved the issue of a person having guns in her own home. Since these decisions, pro-gun advocates³ have asked the Supreme Court to determine whether the Second Amendment protects people who want to carry guns outside their home. At least six different times since *Heller*, the Supreme Court has refused to hear these cases:

1. In *United States v. Masciandaro*, a defendant was convicted of violating a federal law that prohibited people from possessing a loaded weapon in a vehicle in a national park. The defendant argued that the law was unconstitutional under the Second Amendment. The Fourth Circuit said the law was constitutional. The defendant asked the Supreme Court to take the case, but the Court declined.
2. In *Kachalsky v. Westchester County*, the plaintiffs challenged a New York law that required a person to show "proper cause" before he would be granted a concealed carry permit. The plaintiffs argued that the law violated the Second Amendment. The Second Circuit disagreed, and held the law to be constitutional. The plaintiffs asked the Supreme Court to take the case, but the Court declined.
3. In *Woollard v. Gallagher*, the plaintiff challenged a Maryland law that required a person to obtain a permit and show "good and substantial reason" for needing to carry a

² To be fair, I want to point out that while I did do some preliminary research on this issue in the memo, I did not do an exhaustive analysis to determine whether someone might try and bring a 1983 action for a violation of a State Constitutional right. However, I still feel confident in saying that 1983 actions can only be brought to enforce Federal rights, not State rights.

³ I believe Don may have referred to them as "Yosemite Sam" types; which I would agree with.

gun in public before that person could carry a gun in public. The plaintiff argued that the law violated the Second Amendment. The Fourth Circuit ruled that Maryland's law did not violate the Second Amendment. The plaintiffs asked the Supreme Court to take the case, but the Court declined.

4. In *Chardin v. Police Commissioner of Boston*, the plaintiff applied for a license to carry a gun, but was denied because he was convicted of a crime when he was a juvenile. The plaintiff challenged the denial and the law arguing that it was a violation of his Second Amendment rights. The Supreme Court of Massachusetts held that the law did not violate the Second Amendment. The plaintiff asked the Supreme Court to take the case, but the Court declined.

5. In *National Rifle Association v. McCraw*, the plaintiffs challenged a Texas law that essentially prohibited 18-20 year-olds from carrying handguns in public. The plaintiffs argued that this law violated the Second Amendment. The Fifth Circuit ruled that the law did not violate the Second Amendment. The plaintiffs asked the Supreme Court to take the case, but the Court declined.

6. In *Drake v. Jerejian*, the plaintiffs challenged a New Jersey law that prohibited people from carrying guns in public unless they could show a "justifiable need" and obtain a permit. The plaintiffs challenged the law as being unconstitutional under the Second Amendment. The Third Circuit held that the law did not violate the Second Amendment. The plaintiffs asked the Supreme Court to take the case, but the Court declined.

Thus, the Supreme Court has declined several opportunities to agree with Don's interpretation of the Second Amendment. While a denial of certiorari is by no means a conclusive decision by the Supreme Court one way or the other, the fact that they declined certiorari means that these six cases are all still good law.

Because I disagree with Don that the Second Amendment guarantees people the right to carry guns into classrooms, I believe that any suit under 42 U.S.C. § 1983 would fail.

Don also appears to suggest that a student might try and sue faculty for a violation of Article I, Section 11, of the Idaho Constitution (Idaho's Second Amendment.) As I said in the memo, Idaho Courts have not fully delineated the scope of Idaho's Second Amendment. So it is completely possible that the Idaho Supreme Court could rule that a ban on guns at Universities violates Idaho's Second Amendment. However, it is also just as likely that Idaho's Supreme Court would rule that a ban on guns at Universities does not violate Idaho's Second Amendment because a University is a "sensitive place." In support of this, I would also point out to Don that the University has banned guns for many years. If the legislature thought that this was unconstitutional, it could have just let someone challenge the ban in court as violating Idaho's Second Amendment. The fact that such a challenge has never been successfully brought and that the Idaho Legislature had to actually pass this Bill, could suggest that the legislature knew that the University ban did not violate Idaho's Constitution.

In the Federal Constitution context, 42 U.S.C. § 1983 gives a person the right to sue for violations of their Federal Constitutional rights. However, in the State Constitution context, I am unaware of any laws that would give someone the right to sue for a violation of Idaho's Second Amendment. Again, I haven't done what I would call an exhaustive analysis to determine whether such a suit could be brought, but unless Don

knows something that I don't, it seems unlikely that students could bring a lawsuit claiming a teacher violated their Idaho Second Amendment rights.

Don also demonstrates a basic misunderstanding about what [Gier's] article suggested. Don points out that " I don't believe anyone could make the argument that the Board of Regents of University of Idaho have any police powers or the authority to amend or repeal criminal law." Bravo Don. You are absolutely correct, the University does not have the power to amend or repeal criminal laws.⁴ However, the article never said that the University could change or repeal the law. What the article said is that the University can challenge the law as being unconstitutional. If the Idaho Supreme Court agrees, the law would be held to be unconstitutional and could not be enforced against the University. It is not the University that would be amending or repealing the law, it would be the Idaho Supreme Court.

Don also makes the strange argument that the University has no right to contest or disobey this law because it is a criminal law, as opposed to a civil law. This argument is simply incorrect. First, Don incorrectly states that, "all the cases he states supporting the argument for the law not applying to the University of Idaho were civil matters." On page 7 of my Memo, I cited the case of *Dreps v. Board of Regents*. The issue in that case was whether a **criminal law** applied to the University. If Don had read the case, he would have learned that the Idaho Supreme Court held that Idaho's Nepotism Act did not apply to the University.⁵ Second, and more importantly, this argument misstates and misapplies basic legal principals. The point of my memo was that the University can, and should, challenge this law as being unconstitutional. Whether a law is constitutional does not depend solely on whether the law is criminal or civil. The University has just as much right to challenge this law whether the law is civil or criminal. In fact, it is my experience that criminal laws are challenged as being unconstitutional much more often than civil laws.

It also appears that Don is confusing the issue. He appears to be arguing that a University's ban on guns violates the Second Amendment. But that is not the issue in this case. We have never argued that a University ban on firearms does not violate the Second Amendment.⁶ We have only argued that SB 1254 violates the Idaho Constitution by taking away powers that were reserved to the University. If the Idaho Constitution and an Idaho law are in conflict, which one controls? I'm sure even Don can answer that question. Thus, the issue in this case is "Does SB 1254, which purports to take away the University's right to regulate firearms on campus, violate Article 9, Section 10 of the Idaho Constitution?" Given the broad powers retained by the University under the Idaho Constitution, I believe that SB 1254 does violate the Constitution.

Don, it appears that you have misperceived our objection to guns in a classroom. You conclude that professors think guns are "icky." A more apt word would have been "deadly," or "dangerous." Professors are not opposed to guns because guns smell, taste or look bad or repulsive; they are not opposed to guns because guns are sticky, gooey or

⁴ FYI, they don't have the power to amend or repeal civil laws either.

⁵ The Nepotism Act was a criminal statute that made nepotism in public office a misdemeanor.

⁶ Although, as I have explained above, I do not believe that such a ban violates the Second Amendment.

sickly; all things which would make guns icky. They are opposed to guns in the classroom because of guns' destructive power and guns' ability to severely injure other human beings. In particular, guns ability to injure students that professors have an obligation to protect. I imagine that you would not be excited to walk into a cage with a tiger, but that would probably be because you believe that tigers are "dangerous," not because tigers are "icky."

Don also laments the fact that he won't be able to "buy tickets" to watch anti-gun professors freak out about having guns on campus. Well, I have good news for you Don! You need not wait for tickets to go on sale at the University of Idaho to see guns being "parade[d] on campus scaring all the other anti-gun professors." If you are interested in seeing all those anti-gun nuts being scared of guns, here is a **very brief** list of some other schools you might want to plan your next vacation to:

University of Iowa, 6 dead;
Lindhurst High School, 4 dead;
Simon's Rock College, 2 dead;
Kemper Military School and College, 2 dead;
Garfield High School, 2 wounded;
Frontier Middle School, 3 dead;
University of Texas San Antonio, 1 dead;
Columbine High School, 12 dead;
University of Arkansas Fayetteville, 2 dead;
Virginia Tech, 32 dead;
Louisiana Technical College, 3 dead;
Northern Illinois University, 6 dead;
University of Central Arkansas, 2 dead;
Skyline College, 1 wounded;
University of Alabama Huntsville, 3 dead;
University of Texas Austin, 1 dead;
Sandy Hook Elementary, 26 dead;
University of Central Florida, 1 dead;
Grambling State University, 3 injured;
Massachusetts Institute of Technology, 1 dead;
Purdue University, 1 dead;
Seattle Pacific University, 1 dead;
Reynolds High School, 2 dead.

I'm sorry to say that tickets for these events have already been sold out, but with intelligent legislation like I.C. § 18-3309, I can assure you that many more of these exciting events will be Coming Soon to a school near you.

I also disagree with Don's underlying assumption that more guns equals more safety. This assumption is sophomoric. The events of the past two weeks provide excellent counter-examples to Don's beliefs. At Seattle Pacific University, a gunman opened fire on students. The gunman was stopped by a student who pepper-sprayed and tackled him. This may come as a shock to Don, but a good guy without a gun was able to stop a bad guy with a gun. In Las Vegas, two gunmen killed two police officers at a pizza

restaurant. They did not shoot any other people in the restaurant. The two gunmen then went to a Wal-Mart. They yelled for everyone to leave the store, and did not try to shoot anyone inside. One citizen⁷ who had a concealed weapon tried to stop the gunmen. The citizen could not stop the gunmen, and the gunmen killed him. Had this citizen not had a gun, or had he simply left the store, he would still be alive today. Yet another example of how NOT having a gun would have saved a life.

⁷ It appears that this unfortunate soul had a mindset similar to Don.