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RECENT DEVELOPMENTS

ARMED AND LITIGIOUS: THE FLORIDA GUNS AT WORK LAW AND CONSTITUTIONAL SCRUTINY

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This Note addresses the Northern District of Florida's recent decision evaluating the constitutionality of Florida's controversial "guns at work" law.[1] In *Florida Retail Federation, Inc. v. Attorney General*,[2] the court held that the provisions of the statute requiring businesses to allow customers to keep firearms in their cars were unconstitutional under the Equal Protection Clause, but upheld the constitutionality of the statute as applied to employees.[3] *Florida Retail* is notable for three reasons. First, the case involves a unique intersection of property rights, legislative prerogatives, and statutory interpretation. Second, the court decided the case on rational basis equal protection grounds, which is noteworthy on its own, but particularly interesting because the court appears to have raised the equal protection argument sua sponte. Finally, there is some tension between the court's determination that the statute is not ambiguous and its holding that the customer rights provision violated the Equal Protection Clause. This Note provides a short summary of the statute before addressing Chief Judge Hinkle's opinions in the case.

Section 790.251, Florida Statutes (2008), was adopted to guarantee citizens' "right[s] to possess and keep legally owned firearms within their motor vehicles for self-defense and other lawful purposes, and that these rights are not abrogated by virtue of a citizen becoming a customer, employee, or invitee of a business entity."[4] Under the statute, any employee[5] has the right to bring a firearm to work, provided it is locked in a vehicle in the parking lot.[6] However, by sta-

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1. *See* FLA. STAT. § 790.251 (2008); *see also* Dara Kam, '*Guns at Work' Bill Becomes Law*, PALM BCH. POST, Apr. 16, 2008, *available at* http://www.palmbeachpost.com/state/content/state/epaper/2008/04/16/a14a_xgr_guns_0416.html.

2. 576 F. Supp. 2d 1281 (N.D. Fla.), *modified*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008) (merging merits into preliminary injunction order and granting permanent injunction against enforcing customer rights provision).

3. *Id.* The Northern District of Oklahoma reached the opposite result and invalidated a similar statute that was preempted by the Occupational Health and Safety Act (OSHA). *See* ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282, 1295-96 (N.D. Okla. 2007); *see also* OSHA, 29 U.S.C. § 651 (2000). However, as discussed below, Judge Hinkle persuasively argues that OSHA does not preempt most state regulation of workplace safety. *See Fla. Retail Fed.*, 576 F. Supp. 2d at 1298-99.

4. FLA. STAT. § 790.251(3) (2008) (providing legislative intent).

5. For statutory purposes, "[e]mployee" includes independent contractors and volunteers. *Id.* § 790.251(2)(c).

6. *Id.*

tutory definition, "employee" only includes workers with concealed-carry permits.[7] An "employer," inartfully defined as a business with "employees," may not take action against employees who legally bring firearms to work nor condition employment on whether an applicant has a concealed-carry permit.[8] Similarly, the law prohibits employers from discriminating against applicants with concealed-carry permits when making hiring decisions.[9] The statute extends a similar right to customers, regardless of whether they possess a concealed-carry permit.[10] However, because the statutory definitions are particularly inelegant, a plain reading of the text extends this right only to businesses that have statutory "employees"—that is, only businesses with at least one employee with a concealed-carry permit.[11] The statute provides for a $10,000 fine for each violation,[12] but it exempts certain classes of employers, such as schools and correctional facilities.[13]

The Florida Retail Federation and the Florida Chamber of Commerce immediately challenged the validity of section 790.251 in the Northern District, requesting the court to declare the statute unconstitutional and enjoin its enforcement.[14] The plaintiffs argued that section 790.251 violated the Due Process Clause,[15] constituted a regulatory taking without due process or just compensation,[16] and violated the Occupational Safety and Health Act (OSHA).[17] The plaintiffs then moved for a preliminary injunction.[18] The National Rifle

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7. *See id.* § 790.06.
8. *Id.* § 790.251.
9. *Id.* § 790.251(4)(c).
10. *Id.* Customers with concealed-carry permits have the right to carry a concealed weapon into businesses held open to the public, unless otherwise posted. *See id.* § 790.06(12) (explaining that concealed-carry permittees are only restricted from taking firearms into places of nuisance, police stations, courtrooms, polling places, government buildings, schools, colleges, bars, and airports). Similarly, it is not illegal to possess a firearm in a vehicle, so long as it "is securely encased or is otherwise not readily accessible for immediate use." *Id.* § 790.25(5); *see also* § 790.001(17) (" 'Securely encased' means in a glove compartment, whether or not locked; snapped in a holster; in a gun case, whether or not locked; in a zippered gun case; or in a closed box or container which requires a lid or cover to be opened for access."); Ashley v. State, 619 So. 2d 294, 296 (Fla. 1993) (holding that firearm was not readily accessible when kept on floor of car without ammunition in vehicle); State v. Weyant, 990 So. 2d 675, 678 (Fla. 2d DCA 2008) (holding that handgun was not readily accessible when kept wedged between seats and loaded magazine was kept in center console). Thus, the statute only applies to those businesses that have explicitly prohibited firearms on their premises.
11. *See* FLA. STAT. § 790.251.
12. *Id.* §§ 760.51, 790.251.
13. *Id.* § 790.251(7).
14. Complaint at 7-10, Fla. Retail Fed. v. Attorney Gen., 576 F. Supp. 2d 1281 (N.D. Fla.), *modified*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008) (No. 1).
15. *Id.* at 7-8.
16. *Id.* at 8.
17. *Id.* at 9-10.
18. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1284.

Association moved to intervene as a defendant,[19] and the Brady Center to Prevent Gun Violence and several human resource interest groups filed amicus curiae briefs in support of the plaintiffs.[20] The court held a hearing on the preliminary injunction, which was later consolidated with the merits in the court's final judgment.[21]

The court rejected the plaintiffs' takings claim outright.[22] Section 790.251 is clearly not a categorical taking. It is not a permanent taking, as the state did not appropriate or physically occupy the land,[23] nor does it regulate the property so completely as to totally deprive employers of the economic value of their property.[24] Outside these

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19. National Rifle Association's Unopposed Motion to Intervene as a Defendant, *Fla. Retail Fed.*, 576 F. Supp. 2d 1281 (No. 5); *see also* Order Granting Leave to Intervene - National Rifle Association, *Fla. Retail Fed.*, 576 F. Supp. 2d 1281 (No. 17).

20. Amicus Curiae Brief by the Brady Center to Prevent Gun Violence, *Fla. Retail Fed.*, 576 F. Supp. 2d 1281 (No. 16); Society for Human Resource Management's ("SHRM"), HR Florida State Council's ("HR Florida"), Human Resource Ass'n of Broward County's ("HRABC"), Human Resource Management Ass'n of Palm Beach County's ("HRPBC"), and HR Tampa's Brief as Amici Curiae in Support of Plaintiffs' Motion for Preliminary Injunction, *Fla. Retail Fed.*, 576 F. Supp. 2d 1281 (No. 24-2).

21. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1302-03; *see also* FED. R. CIV. P. 65(a)(2) ("Before or after beginning the hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing.").

22. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1289-90. The Fifth Amendment prohibits the government from taking private property for public use without just compensation. U.S. CONST. amend. V. While the Takings Clause nominally applies only to government seizures of private property, the Supreme Court has "recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005).

As a threshold matter, the Northern District could have dismissed the takings claim as premature. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985) ("The Fifth Amendment does not [prohibit state appropriation] of property, it proscribes taking without just compensation."). Thus, the remedy for a regulatory taking is not an injunction, but compensation. Because determining the proper remedy requires analyzing property values and investment-backed expectations, a takings claim is premature until a property owner has applied for compensation and been denied. *Id.* at 195, 199-200. However, given the weakness of the takings claim, it was pragmatically justified to dismiss it without the need for costly compensation proceedings.

23. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1288-89; *see also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) (holding narrowly that permanent physical occupation of property constitutes a taking).

24. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014-15 (1992). Many commentators believe *Lucas* is fairly limited to its facts; some believe its result is due to an erroneous finding of fact at the trial level. *See, e.g.*, Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVT'L L.J. 523, 548 (1995) ("The end result of this review indicates that the *Lucas* decision has not had a major impact on the state courts and has not resulted in more than a trivial number of constitutional invalidations of state and local regulations."); Jeffrey A. Wilcox, Note, *Taking Cover: Fifth Amendment Takings Jurisprudence as a Tool for Resolving Water Disputes in the American West*, 55 HASTINGS L.J. 477, 490 (2003) ("The *Lucas* opinion, though important to an understanding of recent takings jurisprudence, is of limited relevance beyond its peculiar facts. Specifically, the lower court's finding that the property was completely valueless after the regulation seems a bit hard to swallow.").

narrow confines, a taking will be found only if the " 'regulation has interfered with distinct investment-backed expectations.' "[25] While employers are required to permit employees to keep firearms in their vehicles, the statute does not otherwise require property owners to make their property available to people or purposes against their will.[26] Despite the Florida Retail Federation's reliance on *Nollan v. California Coastal Commission*[27] and *Dolan v. City of Tigard*,[28] the court correctly found that they were inapplicable here.[29] Unlike *Nollan* and *Dolan*, the statute does not require the dedication of a permanent easement or comparable invasion of a property owner's right to exclude.[30] Though implicit, the court appeared to hold that the statute simply did not go far enough to constitute a taking.[31]

The court similarly dismissed the substantive due process and OSHA claims.[32] Apart from fundamental rights,[33] "courts give sub-

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25. *Lingle*, 544 U.S. at 538-39 (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978)).

26. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1289. The court's conclusion should not be terribly surprising. Though he did not do so expressly, Judge Hinkle appeared to apply the *Penn Central* balancing test. *See* Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 287 (2006) ("[W]hen the Court decides the *Penn Central* test is applicable to a state or local regulation, the landowner always loses.").

27. 483 U.S. 825 (1987).

28. 512 U.S. 374 (1994).

29. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1289-90.

30. *See Dolan*, 512 U.S. 374; *Nollan*, 483 U.S. 825. *Nollan* and *Dolan* deal primarily with exactions and not outright takings; however, *Nollan* found that a permanent easement was a physical occupation and thus a *per se* taking. *Nollan*, 483 U.S. at 832 ("We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."). The plaintiffs relied heavily on this point to argue that their duty to permit firearms on their property was similarly invasive, which explains why Judge Hinkle was careful to distinguish these cases, even though he had already concluded that section 790.251 did not constitute a permanent occupation. *See* Motion for Preliminary Injunction, Request for Expedited Hearing, and Memorandum of Law at 5-6, *Fla. Retail Fed.*, 756 F. Supp. 2d 1281 (No. 9).

31. *Cf.* Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

32. *Fla. Retail Fed.*, 756 F. Supp. 2d at 1297-99. The court rejected the plaintiff's direct substantive due process claims; however it raised the possibility that the Due Process Clause also prevents legislatures treating "like-situated individuals or businesses differently without an adequate basis." *Id.* at 1288. While this protection is traditionally the province of the Equal Protection Clause, it could conceivably arise from the Due Process Clause's protection against "wholly irrational restrictions." *Id.* at 1287. For a more detailed analysis of this distinction, see *infra* notes 48-51 and accompanying text.

33. Though the U.S. Supreme Court has not fully defined the scope of fundamental rights, it has found these rights include at least

> the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion. We have also assumed,

stantial deference to legislative judgments" and apply rational basis scrutiny to regulations challenged under the substantive component of the Due Process Clause.[34] Under a rational basis analysis, "the challenged provision need only be rationally related to a legitimate government purpose."[35] Though it seems doubtful that permitting employees and customers to keep firearms in their vehicles would have any substantive effect on crime,[36] the Northern District held that the legislature could have reasonably determined that allowing employees to keep firearms in their vehicles would serve a legitimate state interest.[37] Similarly, the "decision to protect only a worker with a concealed-carry permit" was clearly not an irrational distinction.[38]

The plaintiffs also argued that OSHA preempted section 790.251.[39] Under OSHA, employers have a general duty to provide a workplace free " 'from recognized hazards that are causing or are likely to cause death or serious physical harm' " and to " 'comply with occupational safety and health standards promulgated' " by the Occupational Safety and Health Administration.[40] The plaintiffs, rely-

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> and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment.

Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997) (citations omitted).

34. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 545 (2005) ("[W]e have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation."); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-25 (1978) ("Regardless of the ultimate economic efficacy of the statute, we have no hesitancy in concluding that it bears a reasonable relation to the State's legitimate purpose . . . , and we therefore reject appellants' due process claim."); Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) ("We refuse to sit as a 'superlegislature to weigh the wisdom of legislation . . . .' " (quoting Day-Brite Lighting, Inc., v. Missouri, 342 U.S. 421, 423 (1952))).

35. Schwarz v. Kogan, 132 F.3d 1387, 1391 (11th Cir. 1998).

36. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1290 ("The statute will rarely make any difference at all but may sometimes cause a result that is positive, sometimes negative."). The plaintiffs argued that because firearms are required to be locked in the trunk, the statute could not rationally relate to the State's interest in promoting lawful self-defense. Motion for Preliminary Injunction, Request for Expedited Hearing, and Memorandum of Law, *supra* note 30, at 13-14. The court disagreed, noting that occasionally situations requiring self-defense "develop over enough time" to allow the firearm to be retrieved from the vehicle. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1290-91. "More importantly," an employee would be able to have access to the firearm "while en route to and from his or her job." *Id.* at 1291. While unlikely to substantially deter or prevent crime, the possibility was not so remote as to overcome the deference afforded the legislature by the rational basis test.

37. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1290-91.

38. *Id.* at 1289 ("The permit process provides some check on the person's qualification to have a weapon in particular circumstances.").

39. *Id.* at 1297-98.

40. *Id.* (quoting 29 U.S.C. § 654(a) (2006)); *see also* 29 U.S.C. § 655 (2006) (providing for promulgation of "national consensus standards"). The OSHA claim was probably the plaintiffs' best argument. Most of the *amici* focused solely on this claim and *ConocoPhillips* actually addressed a narrower statute.

ing on *ConocoPhillips*,[41] argued that the general duty clause preempted section 790.251.[42] Judge Hinkle, however, declined to adopt the Northern District of Oklahoma's reasoning and found that the general duty clause did not preempt section 790.251.[43] Contrary to the holding of the district court in *ConocoPhillips*, OSHA disclaims any intent to preempt state laws that are not contrary to published standards.[44] Accordingly, because the Agency has not promulgated a national standard for firearms in the workplace, the state may freely adopt whatever regulations it deems necessary.[45] The general duty clause mandates businesses to provide a workplace free of recognized hazards; if firearms in the workplace were a recognized hazard, then employers would be required to prohibit them.[46] As businesses clearly do not have a duty to ban firearms, the general duty clause does not preempt section 790.251.[47]

Interestingly, Judge Hinkle raised, apparently sua sponte, an equal protection argument against the customer rights provision of section 790.251.[48] While the court indicated that both the Equal Protection and Due Process Clauses prohibit a state from "treat[ing] like-situated individuals or businesses differently without an adequate basis,"[49] it appears that neither the plaintiffs nor their amici raised an equal protection argument.[50] Further, while the Equal Protection and Due Process Clauses share similar standards of review,

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41. ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282, 1340 (N.D. Okla. 2007), *rev'd*, Ramsey Winch Inc. v. Henry, 555 F.3d 1199 (10th Cir. 2009) (invalidating similar guns-at-work law for violating OSHA general duty clause).

42. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1297.

43. *Id.* at 1298-99.

44. *Id.* at 1298 ("When Congress elects not to preempt a state law, the law is not preempted."); *see also* 29 U.S.C. § 667(a) (2006) ("Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title."). Interestingly, *ConocoPhillips* was reversed on appeal by the Tenth Circuit, which cited Judge Hinkle's opinion approvingly. *See Ramsey Winch Inc.*, 555 F.3d at 1207.

45. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1298.

46. *Id.* at 1298-99.

47. *Id.*

48. The employee rights provision did not raise equal protection concerns. While the provision only applies to employers with at least one employee with a concealed-carry permit, all businesses are treated alike. *Id.* at 1289 ("Every business must allow any worker with a concealed-carry permit to have a gun in the worker's vehicle.").

49. *Id.* at 1288.

50. *See* Complaint, *supra* note 14; Motion for Preliminary Injunction, Request for Expedited Hearing, and Memorandum of Law, *supra* note 30; Amicus Curiae Brief by the Brady Center to Prevent Gun Violence, *supra* note 20; Society for Human Resource Management's (SHRM), HR Florida State Council's (HR Florida), Human Resource Ass'n of Broward County's (HRABC), Human Resource Management Ass'n of Palm Beach County's (HRPBC), and HR Tampa's Brief as Amici Curiae in Support of Plaintiffs' Motion for Preliminary Injunction, *supra* note 20. The plaintiffs did introduce evidence that customers may prefer to frequent businesses that do not allow concealed weapons on their premises; however this was not used to support an explicit equal protection argument. *See Fla. Retail Fed.*, 576 F. Supp. 2d at 1292.

courts do not routinely permit equal protection arguments to support due process causes of action.[51] Under the Equal Protection Clause, "a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable set of facts that could provide a rational basis for the classification."[52] Because concealed-carry permittees and their employers are not suspect classes and the right to carry a gun at work is not a fundamental right, the court found that section 790.251 was subject to the lowest level of constitutional scrutiny.[53]

The court noted that only statutory "employers" would be required to allow their customers to keep firearms in their cars; thus, a customer would only have the right to leave a firearm in his or her car in the parking lot if the business where he or she was shopping had an employee with a concealed-carry permit.[54] Therefore, businesses next door to one another could be treated differently under statute. Further, as personnel changes, and concealed-carry permits are issued, expire, or are revoked, it would be nearly impossible for businesses to know whether they were subject to the statute on a day-to-day basis.[55] This uncertainty appears to be the guiding factor in the court's decision. Because of the difficulty of differentiating between busi-

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51. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1288 (quoting Williams v. Pryor, 240 F.3d 944, 947-48 (11th Cir. 2001)). In *Williams*, the Eleventh Circuit stated that "[s]tatutes that infringe fundamental rights, or that make distinctions based upon suspect classifications such as race or national origin, are subject to strict scrutiny, which requires that the statute be narrowly tailored to achieve a compelling government interest." *Williams*, 240 F.3d at 947. This quote is somewhat ambiguous; however, in context it is clear the Eleventh Circuit is not conflating the Equal Protection and Due Process Clauses, but discussing the importance of correctly deciding the level of scrutiny to apply to a particular statute. While rational basis inquiry is similar under the two provisions, the *Williams* court did not imply that equal protection claims could be raised as a subset of claims permissible under the Due Process Clause. *See id.* Though the Due Process Clause does protect against purely irrational restraints, which conceivably includes irrational distinctions, courts tend to restrict the due process analysis to the nature of the restraint, while analyzing the impact of the restraint across populations under the Equal Protection Clause. Thus, despite the *Williams* passage, it appears the Northern District's equal protection rulings were outside the scope of the plaintiff's express claims.

52. F.C.C. v. Beach Comms., Inc., 508 U.S. 307, 313 (1993); *see also* Georgia Cemetery Ass'n v. Cox, 353 F.3d 1319, 1321 (11th Cir. 2003). This standard is quite forgiving; "a legislature that creates these categories need not 'actually articulate at any time the purpose or rationale supporting its classification.' " Heller v. Doe, 509 U.S. 312, 320 (1993) (quoting Nordlinger v. Hahn, 505 U.S. 1, 15 (1992)).

53. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1288.

54. *Id.* at 1291-93.

55. *Id.* This difficulty is compounded because independent contractors are considered employees under section 790.251; thus a business's duty to allow firearms in its parking lot could turn on whether a plumber or electrician had a concealed-carry permit. *Id.* This uncertainty is unconstitutional from the employer's perspective because the employer may be unable to determine if it can lawfully exclude firearms. *See id.* at 1292. On the other hand, customers can presume that they are able to keep firearms in their vehicles, unless otherwise posted. *See* FLA. STAT. § 790.25(5) (2008).

nesses that are subject to the statute and those that are not, the court held the customer rights provision unconstitutional even under rational basis review.[56] The Attorney General argued that the court should read the customer rights provision to apply "to all businesses, not just to businesses with at least one worker who has a concealed-carry permit."[57] While the court noted its construction of the statute led to an irrational result, it found the statutory language unambiguous.[58] Because the statutory language was clear, the court refused to "rewrite" the statute.[59]

The court's determination that the statute failed the rational basis test is surprising as nearly "every statute subject to the very deferential rational basis scrutiny standard is found to be constitutional."[60] Indeed, a statute may be found constitutional "based on rational speculation unsupported by evidence or empirical data."[61] It seems clear that the only reason the court found the distinction unconstitutional is that it was entirely inadvertent. A court evaluating the constitutionality of a statute is required "to negative every conceivable basis which might support" the customer rights provision;[62] under rational basis, a court will uphold nearly any conscious distinction, " 'absent some reason to infer antipathy.' "[63] Here, the problem was not that the legislature discriminated against a class of employers, but that it failed to articulate a standard that employers could use to determine if the statute applied to them.[64]

Rather than a reasoned distinction, the statutory history strongly implies the distinction was inadvertently created by a poorly drafted amendment. As Judge Hinkle noted, an earlier version of the statute "would have applied equally to workers who did and did not have concealed-carry permits."[65] Though the court declined to determine

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56. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1293.

57. *Id.* at 1296.

58. *Id.*

59. *Id.*

60. Williams v. Pryor, 240 F.3d 944, 947-48 (11th Cir. 2001); *see also* District of Columbia v. Heller, 128 S. Ct. 2783, 2817 n.27 (2008) (noting that "almost all laws . . . pass rational-basis scrutiny").

61. F.C.C. v. Beach Comms., Inc., 508 U.S. 307, 315 (1993).

62. *Id.* ("[T]he absence of legislative facts explaining the distinction [o]n the record . . . has no significance in rational-basis analysis." (alteration in original) (citation omitted) (internal quotation marks omitted)).

63. *Id.* at 314 (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

64. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1291-92 ("A business's obligation to comply with the statute thus could turn not only on whether it has a traditional employee with a concealed-carry permit, but on whether a person who comes to fix the plumbing has a concealed-carry permit. This could change minute-by-minute. A business often will have no way of knowing whether it is subject to the statute or not.").

65. *Id.* at 1296. The original Senate version of the bill defined "employee" as "any person who [w]orks for salary, wages, or other remuneration; [i]s an independent contractor; or [i]s a volunteer, intern, or other similar individual for an employer." FLA. S. COMM. ON

whether the legislature purposefully drafted the customer rights provision to garner votes or made a drafting error,[66] it seems probable that the legislature failed to fully incorporate the amended definition of "employer" into the rest of the statute. The court itself appears to have overlooked the most convincing evidence that the legislature failed to fully incorporate the amended definition of "employer." Section 790.251's antidiscrimination provision only applies to statutory employers.[67] Thus, a business with no employees with concealed-carry permits at the time the statute was adopted would be free to condition employment on whether or not a prospective employee had a concealed-carry permit and obtain agreements from its current employees that they would not acquire concealed-carry permits.[68] From the text alone, this is inconsistent with the legislature's intent.

However, the absurdity of the result does not necessarily imply that Judge Hinkle's ruling was incorrect. If "the language of a statute is this clear, a court's job ordinarily is to apply the statute as written, not to rewrite it in the belief that the Legislature must have meant something else."[69] Further, under normal principles of statutory interpretation, "statutory definitions of terms . . . prevail over colloquial meanings."[70] The court can ignore statutory definitions in rare cases when they would create "obvious incongruities in the language, and . . . destroy . . . the major purposes of the [statute]."[71] Here, mechanically importing the amended definition of "employee" into the textual definition of "employer" damages the customer rights and an-

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JUDICIARY, CS FOR SB 1130 (draft of March 27, 2008) (providing the proposed FLA. STAT. § 790.251).

66. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1296.

67. *See* FLA. STAT. § 790.251(4)(c); *see also Fla. Retail Fed.*, 576 F. Supp. 2d at 1293-94.

68. The statute would become effective if an employee obtained a concealed-carry permit in violation of an agreement not to do so; however, the agreement itself would not be contrary to the statute until an employee actually obtained a concealed-carry permit and brought the employer within the statutory definition.

69. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1296.

70. W. Union Tel. Co. v. Lenroot, 323 U.S. 490, 502 (1945); *see also* Stenberg v. Carhart, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."); Meese v. Keene, 481 U.S. 465, 484 (1987) ("It is axiomatic that the statutory definition of the term excludes unstated meanings of that term.").

71. Lawson v. Suwannee Fruit & Steamship Co., 336 U.S. 198, 201 (1949); *see also* Burgess v. United States, 128 S. Ct. 1572 (2008) (applying *Lawson* to refuse to read the definition of "felony" into the definition of "felony drug conviction"); Philko Aviation, Inc. v. Shacket, 462 U.S. 406, 412 (1983) ("[W]e need not read the statutory definition mechanically . . . , since to do so would render the recording system ineffective and thus would defeat the purpose of the legislation."). Further, *Lawson* dealt specifically with an antidiscrimination provision under the Longshoremen's and Harbor Workers' Compensation Act. *Lawson*, 336 U.S. at 199-200. The Court found that literally importing the statutory definitions would undermine the statute's antidiscrimination purposes and held that a statutorily defined term was not incorporated to all of the statutory provisions. *Id.* at 201, 206.

tidiscrimination provisions. However, the legislature's intent is not at all clear in this case. While the legislature presumably did not intend to tie the customer rights provision to whether a business had employees with concealed-carry permits, it may very well have wanted to extend the concealed-carry permit requirement to customers.[72] Without any further guidance, the court correctly invalidated the customer rights provision, leaving it to the legislature to correct the provision as it sees fit.

For all of the attention it received,[73] *Florida Retail* is unlikely to have any significant impact on crime or workplace violence. As a preliminary matter, Florida law permits employees and customers alike to bring firearms to work unless otherwise posted.[74] Further, even those firearms kept in a car against the employer's wishes "will *almost* always stay in the vehicle and affect nobody's safety one way or the other."[75] While it is possible that a firearm kept in a vehicle will be used in lawful self-defense or by "an irate worker"[76] to commit a crime that would not occur if the gun was not readily available, it is more likely that all or nearly all guns covered by section 790.251 will never be used or needed. Further, violent employees may be unlikely to comply with policies prohibiting firearms. Similarly, even if employers were permitted to prohibit firearms, it is unlikely they could enforce the policy on a daily basis or verify its effectiveness.

Similarly, while the case raised public policy concerns about the benefits and dangers posed by firearms, the decision deals with the Second Amendment only peripherally.[77] Federal courts have held that it is otherwise permissible to fire an employee for bringing a

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72. *See Fla. Retail Fed.*, 576 F. Supp. 2d at 1296.

73. *See, e.g.*, Catherine Dolinski, *Judge Refuses to Stand in Way of Guns-at-Work Law*, TAMPA TRIB., June 25, 2008, *available at* http://www2.tbo.com/content/2008/jun/25/judge-refuses-stand-way-guns--work-law; *Fla. Guns at Work Law Upheld by Federal Judge*, MSNBC.COM, July 29, 2008, http://www.msnbc.msn.com/id/25918101; *Florida Chamber Leads Business Challenge to Guns-at-Work Law*, TAMPA BAY BUS. J., Apr. 18, 2008, http://tampabay.bizjournals.com/tampabay/stories/2008/04/21/story5.html; *Showdown*, ECONOMIST, July 3, 2008.

74. FLA. STAT. § 790.25(5) (2008); *see also id.* § 790.01(17).

75. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1290. Concealed-carry permittees are very unlikely to commit violent crimes. The State has only revoked 165 of the over 1.3 million concealed-carry permits issued for firearm related crimes. Defendant, National Rifle Association's, Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction at 11 n.6, *Fla. Retail Fed.*, 576 F. Supp. 2d 1281 (No. 31).

76. *Fla. Retail Fed.*, 576 F. Supp. 2d at 1290.

77. The court does not cite the Supreme Court's recent decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). Briefing on the motion for preliminary injunction was conducted after oral argument was held in *Heller*, but before the court's decision. *See* Response of Attorney General in Opposition to Plaintiffs' Motion for Preliminary Injunction at 1 n.1, *Fla. Retail Fed.*, 576 F. Supp. 2d 1281 (No. 30).

firearm onto an employer's property.[78] Even after *Heller*, the federal right to keep and bear arms does not extend to invitees or employees on private property.[79] Thus, while *Heller*'s version of the Second Amendment is more robust than the Court has ever previously recognized, it does not extend to the facts contemplated by section 790.251. This statute extends constitutional rights—it does not infringe upon them—and the case is unlikely to have any further ramifications in Second Amendment jurisprudence.

However, the case may lead courts to increase the scrutiny they apply when evaluating the constitutionality of statutes. Many courts and commentators presume that once the court applies the rational basis test, the statute will pass constitutional muster.[80] However, this approach has been heavily criticized.[81] While courts should refrain from second-guessing legislatures, there is no reason to uphold facially irrational or discriminatory statutes.[82] Courts could follow Judge Hinkle's approach by requiring statutes to meet something closer to the colloquial definition of rationality while still maintaining substantial deference to the legislature. This may be part of an emerging trend. For instance, the U.S. Supreme Court nominally applied rational basis review to strike down a Texas antisodomy statute.[83]

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78. *See, e.g.*, Bastible v. Weyerhaeuser, 437 F.3d 999, 1008 (10th Cir. 2006) (denying former employees' claims for wrongful discharge after employer found firearms in employees' vehicles).

79. *See Heller*, 128 S. Ct. at 2817 (emphasizing that the Second Amendment protects the individual right to bear arms for self-defense).

80. F.C.C. v. Beach Comms., Inc., 508 U.S. 307, 313-14 (1993); Williams v. Pryor, 240 F.3d 944, 947-48 (11th Cir. 2001). Indeed, between 1971 and 1996, there were only ten successful rational basis equal protection claims before the Supreme Court. *See* Robert C. Farrell, *Successful Rational Basis Claim in the Supreme Court from the 1971 Term Through* Romer v. Evans, 32 IND. L. REV. 357, 357 (1999).

81. *See, e.g.*, Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1216-17 (1978) (arguing that because of tiered judicial scrutiny, "only a small part of the universe of plausible claims of unequal and unjust treatment by government is seriously considered by the federal courts; the vast majority of such claims are dismissed out of hand").

82. The Court has, at different times, upheld laws which appear biased or silly. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 726 (1963) (upholding a Kansas statute making engaging in the business of debt adjustment a misdemeanor); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489-90 (1955) (upholding an Oklahoma statute making it unlawful to use advertising media to solicit the sale of eyeglasses); Carolene Prods. Co. v. United States, 323 U.S. 18, 30-32 (1944) (upholding ban on shipping filled milk products because they might be confused with milk products). Indeed, a statute must generally be facially ridiculous to be invalidated under the rational basis test. *See, e.g.*, DeWeese v. Town of Palm Beach, 812 F.2d 1365, 1365 (11th Cir. 1987) (invalidating ordinance prohibiting topless appearances in a case brought by a male runner).

83. *See* Lawrence v. Texas, 539 U.S. 558 (2003). The Court did not explicitly articulate a standard of review for the case, but neither did the Court declare sexual orientation a suspect class nor find a fundamental right applicable in the case. *See id.* at 586 (Scalia, J. dissenting) ("[N]owhere does the Court's opinion declare that homosexual sodomy is a 'fundamental right' under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a

However, it seems unlikely that *Florida Retail Federation* will be doctrinally important. The court's decision appears motivated not by an increased level of rational basis scrutiny, but because even under the most lenient standard, it was difficult to determine which businesses would be covered by the statute. Judge Hinkle was not invalidating the legislature's distinction between classes; rather, Judge Hinkle was holding that the legislature failed to adequately define the class in question. Though the court favorably cites commentary criticizing the rational basis test,[84] it is unlikely that this case will implicate equal protection review in further cases.

'fundamental right.' . . . [T]he Court simply describes petitioners' conduct as 'an exercise of their liberty'—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far-reaching implications beyond this case."). Similarly, the Court explicitly held that a Colorado referendum, which prohibited local governments from protecting sexual preference in antidiscrimination ordinances, unconstitutional under rational basis review. Romer v. Evans, 517 U.S. 620, 623 (1996).

However, many commentators believe the Court is actually applying intermediate scrutiny or some form of scrutiny between rational basis and intermediate scrutiny. *See, e.g.*, Michael P. Allen, *The Underappreciated First Amendment Importance of* Lawrence v. Texas, 65 WASH. & LEE L. REV. 1045, 1051 (2008) (noting that the Court's analysis was neither traditional strict scrutiny nor rational basis); Neelum J. Wadhwani, *Rational Views, Irrational Results*, 84 TEX. L. REV. 801, 801 (2006) ("In *Romer v. Evans*, for example, the Supreme Court stated that it was applying rational basis review to the Colorado anti-gay-rights amendment, yet the subsequent analysis did not resemble traditional rational basis review." (citations omitted)); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2794 (2005) (stating that *Lawrence* "demonstrate[s] a more searching or meaningful form of rational basis review—or rational basis with bite in application if not in name—by directly addressing the legitimate interests proffered by the government and assessing whether those interests are rationally related to the classification in question"). While sexual orientation is not a protected class, the Court appears unwilling to allow outright discrimination on such grounds.

84. *See Fla. Retail Fed.*, 576 F. Supp. 2d 1281, 1288 (N.D. Fla. 2008) (citing Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972)).