IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

AARON TRIBBLE, Plaintiff, vs. STATE BOARD OF EDUCATION AND BOARD OF REGENTS OF THE UNIVERSITY OF IDAHO, and DUANE NELLIS, in his official capacity as president of the University of Idaho, Defendants.	Case No. **CV-2011-0069** **MEMORANDUM DECISION**

I. NATURE OF THE CASE

Aaron Tribble ("Tribble"), a student at the University of Idaho College of Law and an occupant of housing owned by the University of Idaho ("University"), brought this action *pro se* against the State Board of Education, the Board of Regents of the University of Idaho, and Duane Nellis in his official capacity as president of the University of Idaho.[1] Tribble asserts that the University's "Apartment/Family Housing Agreement" and policies regarding firearms, which strictly forbid him from possessing firearms within his University-owned family housing-unit, are unlawful on the three grounds: First, he claims the policies violate I.C. § 18-3302J which pre-empts local regulation of firearms. Second, he claims the policies violate his right to keep and bear arms as guaranteed by the Second and Fourteenth Amendments to the U.S. Constitution and 42 U.S.C. § 1983. Third, he claims the policies violate his right to keep and bear arms as protected by Article I, § 11, of the Idaho Constitution.

Tribble seeks a permanent injunction enjoining the Regents from enforcing any regulation prohibiting him from possessing lawful firearms within University-owned housing. The parties have filed cross-motions for summary judgment. Oral argument was heard by this Court on October 12, 2011. Tribble represented

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[1] Even though Tribble has sued the State Board of Education, the Board of Regents of the University of Idaho, and its president, Duane Nellis, the governing body for the University of Idaho is its Board of Regents. An Act to Establish the University of Idaho § 5 (1889) ("Territorial Act"). As such it is the entity authorized to sue and be sued by the constitution. *State ex. rel Black v. State Board of Education*, 33 Idaho 415, 196 P.201, 205 (1921) *relying on* IDAHO CONST. art. IX, § 10. Because of this, this Court will refer to the Defendants as "the Regents."

himself at the hearing. The Regents were represented by Kent E. Nelson, General Counsel for the University.

II. FACTS

The following facts are undisputed. On February 20, 2009, Tribble entered into a license[2] agreement with the University to occupy a family-housing unit in the South Hill Vista apartment complex located on the University's campus. *Aff. of Raymond Frederick Gasser* at 3. The term of the license was from July 1, 2009, through June 30, 2011. *Id; Ex. C, 2009-2010 Apartment/Family Housing Agreement.* In order to occupy the unit, Tribble had to agree to the terms of the University's Apartment/Family Housing Agreement. *Aff. of Aaron Trible in Support of Pl.'s Mot. for Summ. J.* at 3, *Ex. E, Defs.' First Set of Disc. Resp.* at 11-12. One of those terms stated that Tribble was "strictly prohibited" from possessing firearms within the unit. *Aff. of Raymond Frederick Gasser* at 4, *Ex. C, 2009-2010 Apartment/Family Housing Agreement* at 2, § 20. A student's breach of the University's Apartment/Family Housing Agreement may result in termination of the student's license and eviction from the premises. *Defs.' Answer to Second Am. Compl.* at 4. Tribble filed this lawsuit on January 18, 2011. *Pl.'s Compl.* Tribble subsequently entered into a renewal agreement, once again agreeing to the

[2] "A license . . . is ordinarily considered to be a mere personal or revocable privilege to perform an act or a series of acts on the land of another." *Hennebont Co. v. Kroger Co.*, 221 Pa. Super. 65,69, 289 A.2d 229, 231 (Pa. Super. Ct. 1972) (citation omitted). "A license with respect to real property is 'a privilege to go on the premises for a certain purpose, . . . it does not operate to confer on, or vest in, the licensee any title, interest, or estate in such property.'" *Timmons v. Cropper*, 40 Del. Ch. 29, 32, 172 A.2d 757,759 (Del. Ch. 1961) *quoting* 53 C.J.S. *Licenses* § 84; *see also* BLACK'S LAW DICTIONARY 830 (5th ed. 1979).

terms of the University's Apartment/Family Housing agreement on March 25, 2011. *Aff. of Raymond Frederick Gasser* at 3-4, *Ex. F, 2011-2012 Apartment/Family Housing Agreement.* Pursuant to that renewal agreement, Tribble currently holds a license to occupy the unit until August 5, 2012. *Id.*

Tribble complains of the following University policies, which the Regents admit they actively enforce. *Defs.' Answer to Second Am. Compl.* at 3. First, the University's Administrative Procedure Manual ("APM") § 35.35 (H-1) states that "firearms are prohibited on University property." Second, APM § 35.35 (H-3) provides that "explosive substances are prohibited on University premises." A student's violation of those provisions, may result in discipline, including expulsion pursuant to APM § 35.35 (H-4). That provision also subjects students to discipline pursuant to University of Idaho Student Code of Conduct ("UISCC") Article XI. Discipline may include community service, restitution, and administrative fees. Lastly, UISCC Article VI, § 12, prohibits loaded guns on campus. A student's violation of UISCC subjects the student to discipline pursuant to UISCC Article XI. Discipline may include community service, restitution, administrative fees, and expulsion.

Tribble owns a shotgun and handgun which he stores at the Moscow police substation in compliance with the University's policies. *Aff. of Aaron Tribble in Support of Pl.'s Mot. for Summ. J.* at 2. He challenges the University's policies

which prohibit him from possessing his firearms within his University-owned housing unit. *Pl.'s Second Am. Compl.* at 4-6.

III. STANDARD OF REVIEW

Summary judgment should be entered when "the pleadings, affidavits, and discovery documents indicate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Banner Life Insurance Company v. Mark Wallace Dixson Irrevocable Trust*, 147 Idaho 117, 123 206 P.3d 481, 488 (2009) *citing* Rule 56(c), I.R.C.P. (citation omitted). The moving party has the burden of proving that no genuine issue of material fact exists. *Id.* (citation omitted). A trial court "liberally construe[s] the record in a light most favorable to the party opposing the motion, drawing all reasonable inferences in favor of that party." *DBSI/TRI V v. Bender*, 130 Idaho 796, 801-02, 948 P.2d 151, 156-57 (1997) (citations omitted). "The fact that the parties have filed cross-motions for summary judgment does not change the applicable standard of review, and this Court must evaluate each party's motion on its own merits." *Borley v. Smith*, 149 Idaho 171, 176, 233 P.3d 102, 107 (2010) *quoting Intermountain Forest Mgmt., Inc. v. La. Pac. Corp.,* 136 Idaho 233, 235, 31 P.3d 921, 923 (2001). However, if a court rather than a jury will try the action, "the court may, in ruling on the motions for summary judgment, draw probable inferences arising from the undisputed evidentiary facts." *Banner Life Insurance Company*, 147 Idaho at 124, 206 P.3d at 488. (citations omitted). Because the parties do not dispute the

material issues of fact relating to this matter, summary judgment is appropriate to dispose of the legal issues.

IV. ISSUES

A. Did Tribble waive his right to keep and bear arms by agreeing to the terms of the license agreements?

B. If so, did the Regents place an unconstitutional condition on Tribble's right to keep and bear arms by requiring him to agree to refrain from possessing firearms within University-owned housing in order to gain a license to occupy a housing unit?

C. Have the Regents exceeded their authority and violated I.C. § 18-3302J by regulating the possession of firearms on University property?

D. Does the Idaho Constitution afford greater constitutional protection to its citizens' right to keep and bear arms than the U.S. Constitution?

E. What is the proper level of constitutional scrutiny to be applied to the University's policies which prohibit Tribble from possessing firearms within University-owned housing?

F. Do the University's policies violate Tribble's right to keep and bear arms as protected by the Idaho and U.S. constitutions?

V. ANALYSIS

A. Tribble knowingly, voluntarily, and intelligently waived his right to keep and bear arms by agreeing to the terms of the license agreements.

A waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Zohnson v. Zerbst*, 304 U.S. 458, 464 (1938). Generally, constitutional rights may be waived. *Singer v. U.S.*, 380 U.S. 24, 34-35 (1965). A

waiver of constitutional rights must be "voluntary, knowing, and intelligent." *D.H. Overmeyer Co., Inc. of Ohio v. Frick Co.*, 405 U.S. 174, 185 (1972). A waiver of constitutional rights will not be presumed. *Id.* at 186. The government has the burden to prove waiver by clear and convincing evidence. *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991).

Whether a waiver is "knowing" depends on several factors such as: whether the individual was represented by counsel during negotiations of the waiver, whether the terms of the waiver were express, and lastly, whether the individual understood the meaning of the terms. *Davies*, 930 F.3d 1390 at 1395.

Whether a waiver of a constitutional right is "voluntary" depends on the totality of the circumstances. *Comer v. Schriro*, 480 F.3d 960, 965 (9th Cir. 2007). The circumstances surrounding the waiver must show that it was "the product of a free and deliberate choice rather than coercion or improper inducement." *Id.*

Whether a waiver of a constitutional right is "intelligent" depends upon "the particular facts and circumstances surrounding [the] case, including the background, experience, and conduct of the [party]." *Johnson*, 304 U.S. at 464. Courts have held that constitutional rights, such as the right to due process and freedom of speech, can be waived by agreement. *D.H. Overmeyer Co., Inc.*, 405 U.S. at 187; *Charter Comm., Inc. v. County of Santa Cruz*, 304 F.3d 927, 935 (9th Cir 2002); *Leonard v. Clark*, 12 F.3d 885, 892 (9th Cir. 1993). However, the government must have a legitimate reason for including a waiver of a

constitutional right in a particular agreement. *Davies,* 930 F.2d at 1399. The absence of a "close nexus" between the government's interest and the specific right waived is evidence that the government does not have a legitimate reason for including the waiver. *Id.* In that case, the waiver should be presumed to be unenforceable. *Id.*

The Ninth Circuit "will not enforce a waiver 'if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement.'" *Charter Comm., Inc.,* 304 F.3d at 935, footnote 9, *quoting Leonard,* 12 F. 3d at 889-890. In *Charter,* the court held that contractual waivers of constitutional rights, which result from negotiation between sophisticated parties, who are represented by counsel, are not likely to be outweighed by a public policy. *Id.* Idaho Courts have taken a similar approach regarding the waiver of constitutional rights. For example, an accused's waiver of his fundamental right to demand a jury trial for a serious offense must be express, voluntary and intelligent. *State v. Wheeler,* 114 Idaho 97, 103, 753 P .2d 833, 839 (Ct. App 1988). In *Wheeler,* the court stated, "waivers of fundamental rights" are not found "in doubtful cases." *Id.* Idaho courts also determine whether there has been a valid waiver of a constitutional right by examining the totality of the circumstances. *State v. Lovelace,* 140 Idaho 53, 64, 90 P.3d 278, 289 (2003) (citation omitted).

Viewing the entirety of the circumstances, this Court concludes that Tribble knowingly, voluntarily, and intelligently waived his constitutional right to keep and bear arms. Tribble's waiver was knowing as he had time to review the terms of the agreements. Both agreements clearly stated that "firearms are strictly prohibited" within the units. Tribble understood the meaning of the terms since he complied with the agreements and stored his guns at the police substation. His waiver was voluntary because he was not subject to any coercion or improper inducement when he entered into the initial agreement. Nor was he coerced when he entered into the renewal agreement. Tribble was not required to live on campus in order to attend the University. His decision to do so was the product of his free and deliberate choice. He freely chose to do so even after bringing this litigation. Tribble's waiver was intelligent based on his background, experience, and conduct. Tribble is an intelligent individual. He is currently in law school and has represented himself competently and well throughout this litigation. Tribble's life experiences as a thirty-six year old adult who has lived in privately-owned housing, and his conduct in entering into the renewal agreement, show that he knew what he was giving up and intelligently waived his constitutional right to keep and bear arms on University-owned property.

The University has a legitimate reason for including the waiver provision in the agreement. The University's proffered reason is "to promote a safe, respectful, violence-free, and orderly environment that is conducive to education and learning

where the safety, health, and welfare of students, staff, faculty, and visitors is of utmost importance." *Defs.' First Set of Disc. Resp.* at 8 (attached to Aff. of Aaron Tribble in Support of Mot. for Summ. J., Exhibit E). The Regents determined that prohibiting firearms could accomplish that goal. It was reasonable for the Regents to conclude that allowing firearms on University property could disrupt the University's learning environment and compromise the safety of those present on campus. The Regents, as the group in charge of promoting a safe learning environment, are in a position to determine the best means possible to accomplish that goal. Furthermore, Tribble's background shows that he was a sophisticated consumer who made the deliberate choice to enter into the agreements and give up his right. The Regents should be able to contract with students regarding University-provided benefits and services. Consequently, Tribble knowingly, voluntarily, and intelligently waived his constitutional right to keep and bear arms.

B. The Regents have not placed an unconstitutional condition on Tribble's right to keep and bear arms because the Regents can lawfully prohibit the possession of firearms within University-owned housing.

The unconstitutional conditions doctrine provides that government cannot impose unconstitutional conditions on the exercise of constitutional rights. *Perry v. Sniderman*, 408 U.S. 593, 597 (1972). The doctrine insures "that the Government may not indirectly accomplish a restriction on a constitutional right which it is powerless to decree directly." *Louisianna Pacific Corp. v. Beazer*

Materials and Services Inc., 842 F. Supp. 1243, 1248 (E.D. Cal. 1994) *citing Perry*, 408 U.S. 593. This is true even though the benefit may be discretionary and the individual has no right to the benefit. *Perry*, 408 U.S. at 597. Acceptance of the condition brings up the issue of waiver. *Lousisiana Pacific Corp.*, 842 F.Supp. at 1252, footnote 19. However, acceptance of the condition does not necessarily preclude a challenge that the waiver provision imposes an unconstitutional condition on the exercise of a constitutional right. *Parks v. Watson*, 716 F.2d 646, 651 (9th Cir. 1983) *citing Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 655-668 (1981).

To make out a *prima facie* case that a condition is unconstitutional, the plaintiff must show: (1) a particular constitutional right is implicated and (2) "that imposition of the condition would violate rights protected by the relevant constitutional provision if sought by the Government directly." *Louisianna Pacific Corp.*, 842 F. Supp. at 1251 (E.D. Cal. 1994). The second step subsumes the level of scrutiny applicable to a direct violation of the constitutional right implicated. *Id.* The burden of proof then shifts to the government to justify the condition. *Id.* at 1253. The government can meet its burden by showing that the condition is "directly related" to the subject of the benefit. *Id. citing Parks*, 716 F.2d 646, 652 (9th Cir. 1983).

In this case, Tribble has shown that the condition in the license agreements, which forbids him from possessing firearms within his University-owned unit,

implicates his right to keep and bear arms protected by the state and federal constitutions. However, he has failed to prove the second element required to state a *prima facie* case under the unconstitutional conditions doctrine. As discussed below, the Regents' have shown that their policies prohibiting the possession of firearms within University-owned housing, pass constitutional muster because they are substantially related to the Regents' important interest in ensuring that the University campus is a safe and violence-free learning environment. By requiring Tribble to agree to refrain from possessing firearms within the University-owned housing unit as a condition to him gaining a license to occupy the unit, the Regents have not placed an unconstitutional condition on Tribble's exercise of his right to keep and bear arms.

C. The Regents have been granted the express authority to regulate the possession of firearms on University property and in carrying out that authority have not violated I.C. § 18-3302J.

In 1889, the Legislative Assembly of the Territory of Idaho passed an act establishing the University of Idaho as "an institution of learning." Territorial Act § 1. The act stated, "the object of the University of Idaho shall be to provide the means of acquiring a thorough knowledge of the various branches of learning connected with scientific, industrial and professional pursuits . . . ." *Id.* at § 9. The act created a Board of Regents with "all powers necessary or convenient to accomplish the objects and perform the duties prescribed by law." *Id.* at § 3. Including the authority to "enact laws for the government of the University in all

its branches, ..." *Id.* at § 5. The act further provided that "the Board may prescribe rules and regulations for the management of . . . [the] property of the University and of its several departments, and for the care and preservation thereof, with penalties and forfeitures, by way of damages for their violation, . . ." *Id.* The act also stated that the Board of Regents "shall have the custody of the books, records, buildings and other property of said University." *Id.* at § 3.

When adopted, the Idaho Constitution confirmed the authority of the Board of Regents over the University of Idaho. IDAHO CONST. art. IX, § 10. Article IX, § 10 states, "[t]he 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, . . ." *Id.* In interpreting the Regents' authority, the Idaho Supreme Court stated,

> 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, ..."

State ex rel. Black v. State Board of Education, 33 Idaho 415, 196 P.201, 205 (1921).

In 2008, the Idaho Legislature passed I.C. § 18-3302J in an attempt to create a uniform set of laws for the regulation of firearms and to "protect the individual citizen's right to keep and bear arms" guaranteed by the state and federal constitutions. I.C. § 18-3302J. The statute states in relevant part,

> [e]xcept as expressly authorized by state statute, no county, city, agency, board or any other political subdivision of this state may adopt or enforce any law, rule, regulation, or ordinance which regulates in any manner the sale, acquisition, transfer, ownership, possession, transportation, carrying or storage of firearms or any element relating to firearms and components thereof, including ammunition.

Id. at (2). The statute then provides that I.C. § 18-3302J(2) shall not affect:

> The authority of 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, to regulate in matters relating to firearms.

Id. at (5)(c).

The power granted to the Regents to manage the affairs of the University by the Territorial Act and the Idaho Constitution Article IX, § 10, is unaffected by I.C. §18-3302J as shown by the plain and unambiguous language of that statute. As the Idaho Supreme Court held in *Black,* when the Regents act within their authority, they are not subject to the control of any other branch of government, including the legislature. Tribble correctly asserts that I.C. § 18-3302J does not grant the Regents any power to regulate in matters relating to firearms. But his

argument that the Regents are without any express authority to regulate the possession of firearms is unfounded. The Regents were granted the power to govern the affairs of the University and the power to enact regulations for the management of University property by the Territorial Act which authority was confirmed by the Idaho Constitution. Accordingly, the Regents' promulgation of policies to govern the possession of firearms on campus is a proper exercise of their authority. In sum, the University's policies regarding the possession of firearms on University property do not violate I.C. § 18-3302J.

D. The Idaho Constitution affords no greater protection to the right to keep and bear arms than that provided by the U.S. Constitution.

It is now undisputed that the Idaho Supreme Court "is free to interpret our State Constitution as more protective of the rights of Idaho citizens than the United States Supreme Court's interpretation of the federal constitution." *State v. Guzman*, 122 Idaho 981, 987, 842 P.2d 660, 666 (1992) *citing PruneYard Shopping Center v. Robins,* 447 U.S. 74, 80-82 (1980). However, just because that possibility exists, does not mean that it will necessarily occur. In *Guzman*, the court went on to state, "[s]uch independent state analysis does not mean that the Court will reach a result different from the United States Supreme Court; it only means that we are free to do so, if it is determined that a different rule better effectuates our counterpart Idaho Constitutional provision." *Id.* at 988, 667 (internal citations omitted). Accordingly, comparable language in the two counterpart constitutional provisions should only be interpreted differently "if there is an articulable basis to

rule that a different meaning is intended in the Idaho Constitution." *State v. McCaughey*, 127 Idaho 669, 675, 904 P.2d 939, 945 (1995) (Schroeder, J., concurring). That articulable basis may be derived "from a historical background or a variation in language or constitutional history. A different interpretation should not arise from nothing more than a subjective dislike for a rule." *Id.*

The Second Amendment to the U.S. Constitution states, "[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." U.S. CONT. amend. II. The U.S. Supreme Court in *District of Columbia v. Heller*, 554 U.S. 570, 626-28, 635 (2008), established that the Second Amendment's core purpose was to protect the right of a mentally competent, law-abiding and responsible citizen to possess a firearm in his home for the purpose of self-defense. The Court held that the Second Amendment protects against "the absolute prohibition of handguns held and used for self-defense in the home." *Heller*, 554 U.S. at 636. The Court narrowed its holding by stating that the right to keep and bear arms is "not unlimited." *Id.* at 626. The Court added, "nothing in our opinion should be taken to cast doubt on long-standing 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. . . ." *Id.* at 626. The Court stated, "we identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627, footnote 26. The Court declined to

announce any level of scrutiny because it found the District of Columbia law, which prohibited handgun possession in the home and required any lawful gun to be inoperable, violated the Second Amendment under any level of constitutional scrutiny. *Id.* at 628-29. The U.S Supreme Court recently held that this right was incorporated under the Due Process Clause of the Fourteenth Amendment to apply against the states. *McDonald v. Chicago*, 130 S.Ct. 3020, 3050 (2010). In determining that the right should be incorporated, the Court stated, "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *Id.* at 3042.

The right to keep and bear arms is also guaranteed by Article I, § 11, of the Idaho Constitution, which states:

> 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.

Article I, §11, was amended in 1978.[3]

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[3] The pre-amendment version stated, "The people have the right to keep and bear arms for their security and defense; but the legislature shall regulate the exercise of this right by law." IDAHO CONST. art. I, § 11 (as originally adopted). The Idaho Supreme Court interpreted the pre-amendment Article I, § 11, to mean that "the legislature may . . . regulate the exercise of this right,

Boiled down to their essence, the provisions read as follows: "the right of the people to keep and bear arms, shall not be infringed" U.S. CONST. amend II; and "[t]he people have the right to keep and bear arms, which right shall not be abridged . . ." IDAHO CONST. art. I, § 11. Substantively, there is little, if any distinction between the two provisions. This Court has not been provided any argument to suggest that applying an interpretation of the right to keep and bear arms, that varies from the one articulated by the U.S. Supreme Court in *Heller* in interpreting the Second Amendment, would "better effectuate" Idaho's constitutional provision. Furthermore, this Court has not been presented any historical evidence to suggest that the similar language in the two provisions should be interpreted differently. Accordingly, there is no articulable basis for this Court to conclude that the Idaho Constitution provides any more protection to its citizens' right to keep and bear arms than does the federal constitution.

Consequently, this Court will apply the U.S. Supreme Court's analysis in *Heller* to both Tribble's state and federal claims that the University's policies violate his right to keep and bear arms.

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but may not prohibit it." *In Re Brickey*, 8 Idaho 597, 70 P. 609, 609 (1902). The court then stated that a statute prohibiting the carrying of concealed weapons would be a proper exercise of the State's police power. *Id.* Following the amendment of Article I, § 11, the Idaho Court of Appeals upheld a statute that provided for an increased penalty for the commission of kidnapping and aggravated battery while using a firearm. *State v. Grob*, 107 Idaho 496, 499 (Ct. App. 1984). The court stated that under either the pre or post-amendment Article I, § 11, the statute passed constitutional muster. *Id.* The court interpreted the post-amendment provision as having narrowed the regulation of firearms that was authorized by the original provision. *Id.* at 498-99.

E. Intermediate scrutiny is the proper standard of review because the University's policies do not place a substantial burden on Tribble's exercise of his core constitutional right to possess a firearm in his *home.*

In determining the constitutionality of government regulations, courts generally apply three varying levels of scrutiny. *See Clark v. Jeter*, 486 U.S. 456, 461 (1988). The standard of scrutiny most deferential to the government, known as "rational basis review," requires a challenger to show that the law does not "rationally further" a "legitimate" governmental interest. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Courts generally apply rational basis review to laws which do not infringe upon fundamental constitutional rights, such as laws involving economic or commercial interests. *Id; U.S. v. Carolone Products Co.*, 304 U.S. 144, 152 (1938). The most exacting level of scrutiny, known as "strict scrutiny" "requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'" *Citizens United v. Federal Election Com'n,* 130 S.Ct. 876, 898 (2010) *quoting Federal Election Comm'n v. Wisconsin Right to Life,* 551 U.S. 449, 464 (2007). Courts generally, but not always, apply strict scrutiny to laws burdening fundamental rights. *See Clark*, 486 U.S. at 461 (internal citations omitted). In between those two levels of scrutiny is a standard of review known as "intermediate scrutiny." *Id.* To survive intermediate scrutiny, the government must show that the challenged regulation is "substantially related to an important governmental objective." *Id.* Courts generally apply intermediate scrutiny to laws

placing an incidental burden on fundamental rights or laws burdening conduct traditionally subject to government regulation, such as commercial speech. *Turner Broadcasting System Inc., v. F.C.C.*, 512 U.S. 622, 662 (1994); *University of N.Y. v. Fox*, 492 U.S. 469, 477 (1989).

Although the right to keep and bear arms is arguably fundamental based on the U.S Supreme Court's holding in *McDonald*, strict scrutiny is not always applied where a fundamental right is at issue. *Heller v. District of Columbia, 2011 WL 4551558* at *8. (C.A.D.C. October 4, 2011), *aff'g in part and vacating in part*, 698 F. Supp. 2d 179 (2010). For example, the U.S. Supreme Court in First Amendment cases has applied intermediate scrutiny to regulations of speech. *See Heller,* 2011 WL 4551558 at *8-9 (citing a number of First Amendment cases where intermediate scrutiny was applied). As in First Amendment cases, the level of scrutiny to be applied to Second Amendment cases "depends on the nature of the conduct being regulated and the degree to which the challenged law burdens the right." *U.S. v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010).

In interpreting the U.S. Supreme Court's decisions in *Heller* and *McDonald*, courts have held that only laws which "substantially burden" or "severely limit" the core Second Amendment right trigger strict scrutiny. *See U.S. v. Chester*, 628 F.3d 673, 682-683 (4th Cir. 2010); *U.S. v. Mazarella,* 614 F.3d 85, 97 (4th Cir. 2010); *Heller*, 2011 WL 4551558 at *10, *14. While other courts have held that "the Supreme Court's description of a list of presumptively lawful regulatory

measures is at least implicitly inconsistent with strict scrutiny." *GeorgiaCarry.org v. Georgia*, 764 F. Supp. 2d 1306, 1317 (M.D. Ga. 2011) *relying on Heller,* 554 U.S. 570, 689 (Breyer, J., dissenting).

In other cases, courts have presumed that regulations burdening the Second Amendment right to keep and bear arms were lawful because the challenged regulations could easily be linked to *Heller*'s list of presumptively lawful regulatory measures. *See United States v. Rozier,* 598 F.3d 768, 771 (11th Cir.2010)); *United States v. Vongxay,* 594 F.3d 1111, 1115 (9th Cir. 2010); *United States v. McCane,* 573 F.3d 1037, 1047 (10th Cir. 2009) (all upholding the federal statute, 18 U.S.C. § 922(g), which bans felons from possessing firearms, against Second Amendment challenges).

Courts have consistently applied traditional intermediate scrutiny to laws that place a burden on conduct outside the core Second Amendment right. *See GeorgiaCarry.org*, 764 F. Supp. 2d at 1317; *U.S. v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011); *Chester*, 628 F.3d at 683; *Heller*, 2011 WL 4551558 at *9-10.

In *Nordyke v. King*, 644 F.3d 776, 786 (9th Cir. 2011), the Ninth Circuit held that only those laws that "substantially burden" the right to keep and bear arms trigger a level of heightened scrutiny under the Second Amendment. The court held that a law imposes a substantial burden on the exercise of the Second Amendment right if it does not leave law-abiding citizens with "reasonable alternative means" to obtain firearms for the purpose of self-defense. *Id.* at 787. A

law is "particularly unlikely to impose a substantial burden on a constitutional right where it simply declines to use government funds or property to facilitate the exercise of that right." *Id.* at 788. The *Nordyke* court applied the substantial burden standard to the ordinance at issue which prohibited gun shows at fairgrounds owned by the government. *Id.* The court found that the complaint had not alleged that the ordinance had made it materially more difficult to obtain firearms, nor did it allege that there were a shortage of places to purchase guns in the area. *Id.* The court stated," [i]n any event, the Ordinance does not prohibit gun shows, but merely declines to host them on government premises." *Id.* The court held that the plaintiffs had therefore failed to allege sufficient facts to state a Second Amendment claim. *Id.*

In *U.S. v. Dorosan*, 350 Fed. Appx. 874, 875 (5th Cir. 2009)(unpublished), the Fifth Circuit found that the parking lot of a U.S. Post Office fit within the definition of a sensitive place and upheld the conviction of the defendant for possessing a gun on property owned by the Postal Service. The court reasoned that because the Postal Service used the lot to load and unload trucks, it was a "place of regular government business," and was within the "sensitive places" exception recognized by *Heller*. *Id. relying on Heller,* 554 U.S. at 626-27. The court found that the lot's status as a sensitive place, plus the Postal Service's constitutional authority as property owner, in addition to the fact that postal service employees did not have to park in the lot as a condition of their

employment, caused the prohibition on keeping guns in cars parked in the lot to be constitutional under any level of constitutional scrutiny. *Id.* at 875-76.

In upholding a defendant's conviction for carrying a loaded firearm in his vehicle while in a National Park against a Second Amendment challenge, a U.S. District Court relied on the principle that "*Heller* 's *dicta* explicitly acknowledges that 'laws *forbidding* the carrying of firearms *in sensitive places* such as schools and government buildings' do not violate the Second Amendment rights of those prosecuted under such laws." *U.S. v. Masciandaro*, 648 F. Supp. 2d 779, 790 (E.D. Va. 2009), *quoting Heller,* 554 U.S. 570 at 626 (emphasis in original). The court reasoned that the examples given of "schools and government buildings" suggested "that motor vehicles on National Park land fall within any sensible definition of a 'sensitive place'" because National Parks, like schools and government buildings, are "public properties where large numbers of people, often strangers (including children), congregate for recreational, educational, and expressive activities." *Id.* The Fourth Circuit affirmed the defendant's conviction on appeal. *See Masciandaro*, 638 F.3d 458, 472 (4th Cir. 2011).

In this case, this Court concludes that intermediate scrutiny is the proper standard of review. That conclusion is reached for the following reasons:

First, the U.S. Supreme Court's list of presumptively lawful regulatory measures in *Heller* is inconsistent with the application of strict scrutiny. That is especially true in cases such as this one where the regulations at issue fall

squarely within the *Heller* Court's list of presumptively lawful regulatory measures.

Second, the policies at issue impose a burden on conduct outside the core Second Amendment right to possess a firearm in the *home* for the purpose of self-defense. Although Tribble utilizes the property at issue as his residence, it is not the traditional home that the Court in *Heller* envisioned. Rather, his unit is located on the campus of what is without a doubt, a "school." If Tribble were not an enrolled student, the spouse of an enrolled student, or otherwise affiliated with the University, he would be ineligible to reside in University-owned housing. Tribble's unit is also analogous to "a government building." It is owned by the Regents and is therefore publicly owned. Furthermore, Tribble lacks any permanent interest in the property. As a licensee, he has no title, interest, or estate in the University-owned housing. *See footnote 2, infra* at 3. Both of the agreements Tribble entered into clearly state that he only holds a license to occupy the unit and that he does not have a property interest in the unit. Like a post-office parking lot, government building, or national park, the University's property is a sensitive place due to the large number of people (including children) who congregate there for recreational, educational, and expressive purposes. Adjoining the University-owned housing are playgrounds for use by the children of those holding licenses to the property. Accordingly, the University's polices do not limit

conduct within Tribble's core Second Amendment right to possess firearms in his *home* for the purpose of self-defense.

Third, the University's policies do not place a "substantial burden" on Tribble's exercise of his right to keep and bear arms. In this case, Tribble has failed to establish that he is unable to exercise his right to keep and bear arms. He could do so easily by relocating to non-University housing. There are any number of apartments and houses across the street from University-owned housing in which Tribble could exercise his rights. As in *Nordyke*, there is no substantial burden on Tribble's constitutional right to keep and bear arms because the Regents have simply declined to provide University property to facilitate Tribble's exercise of his constitutional right. The policies do not leave Tribble without other "reasonable alternative means" to possess firearms for self-defense. Tribble is not required to live in University-owned housing in order to attend the University. Like the Postal Service in *Dorosan*, the Regents have not required Tribble to use University property in the proscribed manner as a precondition to him being able to enjoy an important benefit such as employment or education.

Lastly, applying the "sensitive places" exception and presuming the University's regulations are lawful would be akin to applying rational basis review. The Court in *Heller* rejected rational basis review as the appropriate standard of scrutiny for regulations of the right to keep and bear arms. *See Heller*, 554 U.S. at 628, footnote 27. Consequently, the Regents must be held to a

standard higher than the rational basis test. Intermediate scrutiny therefore appears to be the test that should be applied.

F. Because the University's policies are substantially related to the Regents' important interest in promoting University property as a safe learning environment, they do not violate Tribble's constitutional right to keep and bear arms.

Under the intermediate scrutiny standard of review, the government must show that the challenged regulation is "substantially related to an important governmental objective." *Clark v. Jeter,* 486 U.S. 456, 461 (1988). The government's interest in promoting safety and security has been held to be not only important, but compelling. *See U.S. v. Salerno,* 481 U.S. 739, 747-750 (1987); *Schall v. Martin,* 467 U.S. 253, 264 (1984). The government must show that there is a "reasonable fit" between the challenged regulation and the asserted government objective. *Chester,* 628 F.3d at 683 *citing Fox,* 492 U.S. at 480. One "that represents not necessarily the single best disposition but one whose scope is 'in proportion to the interest served.'" *Fox,* 492 U.S. at 480 *quoting In re R.M.J.* 455 U.S. 191, 203 (1982). The U.S. Supreme Court has held that deference should be given to a legislative body's "findings as to the harm to be avoided and to the remedial measures adopted for that end." *Turner Broadcasting System, Inc. v. FCC,* 520 U.S. 180, 196 (1997). By doing so, courts avoid infringing upon "traditional legislative authority to make predictive judgments when enacting [ ] regulatory policy." *Id.*

On appeal from the district court's decision in *Masciandaro*, the Fourth Circuit declined to reach the issue of whether the particular National Park fit within the definition of a "sensitive place" because the court found that even if the park was not a sensitive place, the regulation making it a crime to carry loaded firearms in a vehicle within National Park land was constitutional under intermediate scrutiny. *U.S. v. Masciandaro*, 638 F.3d 458, 473 (4th Cir. 2011) *aff'g* 638 F.3d 779 (E.D. Va. 2009). The court based its conclusion on the government's substantial, if not compelling, interest in providing for safety on its public lands. *Id.* at 474.

Like the federal government in *Masciandaro*, the Regents have an important interest in providing for safety on campus property. After all, the University was created for the purpose of providing the means for individuals to gain an education. *See Territorial Act* § § 1,9. The Regents were given all the necessary powers to accomplish that purpose. *See id* at § 3. In order to promote the University as an institution of learning, the Regents have an important interest in ensuring that University students, faculty, staff, and visitors are safe and free from the threat of violence while on University property.

The University's policies are substantially related to that interest. Similar to the Postal Service's constitutional authority as property owner, to regulate its property for its lawful use, the Regents have the constitutional authority to regulate University property for its lawful use. Thus, this Court should defer to

the Regents' judgment as to the proper means to ensure that the University campus remains a safe learning environment. The Regents put forth evidence of the large number of people (including children) who congregate on University property for various purposes. *See University Memo in Supp. of Mot. for Summ. J.* at 6-7. The Regents' decision to prohibit the possession of firearms in University housing, located on the University's campus where those individuals will be present, is substantially related to their interest in providing a safe campus community. The policies complained of are not city-wide or state-wide bans on the possession of firearms. Rather, they apply only to University-owned housing units located on University property. Consequently, there is a reasonable fit between the policies and the Regents' important interest in ensuring the University campus remains a safe learning environment.

VI. CONCLUSION

Tribble knowingly, intelligently, and voluntarily waived his right to keep and bear arms by agreeing to the terms of the license agreements. By requiring Tribble to agree to refrain from possessing firearms within his University-owned housing unit as a condition to him gaining a license to occupy the unit, the Regents did not place an unconstitutional condition on his exercise of his right to keep and bear arms.

In carrying out their authority to regulate the affairs of the University, the Regents did not violate I.C. § 18-3302J by prohibiting the possession of firearms in

University-owned housing. The plain language of that statute does not affect the Regents' authority to do so.

Furthermore, the University's policies complained of do not place a substantial burden on Tribble's exercise of his core constitutional right. The policies are substantially related to the Regents' important interest of ensuring that the University campus remains a safe educational and learning environment. As such, the policies do not violate Tribble's right to keep and bear arms under either the federal or state constitution. Consequently, summary judgment is granted in favor of the Regents. Tribble's motion for summary judgment is denied.

Dated this 7th day of December 2011.

John R. Stegner
District Judge

CERTIFICATE OF SERVICE

I do hereby certify that full, true, complete and correct copies of the foregoing Memorandum Decision were delivered in the following fashion to:

Aaron Tribble 354 W. Taylor Ave Apt. # 2 Moscow, ID 83843	[—] U.S. Mail [ ] Overnight Mail [ ] Fax [ ] Hand Delivery
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On this 7 day of December 2011.

Sue Anderson

Deputy Clerk