FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-2797

R.C.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES,
DIVISION OF LICENSING,

Appellee.

On appeal from the Department of Agriculture and Consumer Services, Division of Licensing.
Paul Pagano, Assistant Director.

June 16, 2021

ON HEARING EN BANC

LONG, J.

In 1969, R.C. was convicted of a felony for stealing an eight-track player in Charleston, Illinois. In 1971, his probation was terminated early and the Governor of Illinois restored his "Rights of Citizenship." He later applied for, and received, an Illinois Firearm Owner's Identification Card, an Illinois Concealed Carry License, and completed concealed carry firearms training. The

record suggests that after 1969, R.C. spent the next five decades without another criminal conviction.

When R.C. moved to Florida, he applied for a Florida license to carry a concealed weapon. Relying on a federal law that governs federally licensed firearm dealers, the Department of Agriculture and Consumer Services denied his application. Because the Department's findings of fact are not supported by competent, substantial evidence and its conclusions of law are erroneous, we reverse.

I. Statutory Framework

Florida has a "shall issue" concealed-carry law. § 790.06(2), Fla. Stat. (2020) ("The Department of Agriculture and Consumer Services *shall issue* a license if the applicant" meets the enumerated criteria) (emphasis added); *Norman v. State*, 215 So. 3d 18, 45 (Fla. 2017) (Canady, J., dissenting) (Florida's shall-issue concealed-carry law "broadly require[s] the issuance of concealed-carry permits subject to narrow exclusions."). The Department of Agriculture and Consumer Services is responsible for the issuance of concealed-carry licenses. § 790.06(1), Fla. Stat. ("The Department of Agriculture and Consumer Services is authorized to issue licenses to carry concealed weapons or concealed firearms to persons qualified as provided in this section.").

This shall-issue statutory scheme means the Department is responsible for determining eligibility but has no discretion to deny an applicant that meets the statutory criteria. *Norman*, 215 So. 3d at 21 (plurality opinion) (finding section 790.06 "leaves no discretion to the licensing authority, the licensing authority must issue an applicant a concealed carry license, provided the applicant meets objective, statutory criteria.").

The Department is *exclusively* responsible for determining the eligibility of a concealed-carry license applicant. § 790.06(6)(d), Fla. Stat. ("[T]he Department of Agriculture and Consumer Services *shall determine eligibility* . . . .") (emphasis added). As a part of the eligibility evaluation, the statute requires the submission of the applicant's fingerprints and personal

information for a check against available criminal justice information. § 790.06(6), Fla. Stat. The Department must, within ninety days of receiving the applicant's information, issue the license, deny the license, or suspend the ninety-day period. § 790.06(6)(c), Fla. Stat. These provisions expressly contemplate the Department's evaluation of rights-restoration documents. § 790.06(6)(c)3., Fla. Stat. The suspension of the ninety-day period allows the Department more time to evaluate "proof of restoration of civil and firearm rights." *Id.* The Department may suspend the time limitation "until receipt" of the restoration documents. *Id.*

In addition to other statutory criteria, the Department must consider the final qualification in section 790.06(2). That section is a catch-all provision that states that the applicant must not be "prohibited from purchasing or possessing a firearm by any other provision of Florida or federal law." § 790.06(2)(n), Fla. Stat.

If the eligibility evaluation results in an application denial, the Department must notify the applicant in writing, explain the reason for the denial, and inform the applicant of his right to a hearing under chapter 120. § 790.06(6)(c)2., Fla. Stat. An applicant is entitled to a formal hearing when his substantial interests are affected and there is a disputed issue of material fact. § 120.569(1), Fla. Stat. (2020).

II. Facts

R.C. sought a concealed carry license, submitted the proper paperwork, and paid the $119 fee. He was then informed by letter that the Department denied his application because "[i]nformation received by the Department indicates that you are prohibited under federal law from possessing a firearm pursuant to the National Instant Criminal Background check system," or NICS. This "information" was a search result that provided little—only that he is NICS ineligible for having a felony conviction. It is reproduced in its entirety here:

NICS INELIGIBLE INFORMATION

The following data was received from FDLE:

Submitted from DOACS	Results Delivered	TCN	Name Cnt	Applicant Name	FPP Determination	Reason Code
07/26/2018 12:38:54 AM	07/26/2018 10:59:29 AM	70ST360000020301	1	[redacted]	NICS INELIGIBLE	FELONY CONVICTION

R.C. expressly disputed the factual basis for the denial and invoked his right to a formal evidentiary hearing under chapter 120. He acknowledged that he was convicted of a felony in Illinois in 1969. But he explained, and provided proof, to the Department that Illinois restored his firearm rights and issued him an Illinois Firearm Owner's Identification Card and an Illinois Concealed Carry License. R.C. submitted a restoration of rights certificate from the Governor of Illinois and court documents reflecting the restoration. He argued that he can lawfully purchase and possess a firearm.

But the Department rejected the request for a formal hearing and referred him to an informal hearing. The Department refused the formal hearing because it argued the NICS result was binding as a matter of law and, unless R.C. was disputing the existence of the NICS result, there were no genuinely disputed issues of material fact.

At the informal hearing, the Department elected not to provide a representative and submitted *nothing*. The hearing officer reiterated that the denial of R.C.'s application hinged on the NICS results. R.C. challenged the Department for denying his application without producing any evidence. R.C. argued a formal hearing was required where he could dispute material facts and challenge the documents the Department relied on to deny his application. And he argued, repeatedly, that he is not disqualified under any federal or state law.

Following the hearing, the Department issued a final order. The Department made a finding of fact that "[t]he Department has received information . . . that [R.C.] is prohibited under Federal law from possessing a firearm pursuant to [NICS]." The Department acknowledged that R.C. timely requested a formal hearing and that he had submitted his rights-restoration paperwork. The Department claimed to have "made no

independent determination of [R.C.'s] ability to possess a firearm, but solely depended" on the NICS information. The Department then concluded as a matter of law that it correctly applied section 790.06(2)(n) when it determined that the NICS result prohibits R.C. from possessing a firearm under federal law.

III. Analysis

We have jurisdiction. Art. V, § 4(b)(2), Fla. Const. We review findings of fact for competent, substantial evidence. § 120.68(7)(b) Fla. Stat. (2020). We review statutory interpretations de novo. Art. V, § 21, Fla. Const. ("In interpreting a state statute or rule, a state court . . . may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.").

A. National Instant Criminal Background Check System (NICS)

The Department denied R.C.'s application claiming that he was prohibited by NICS from possessing a firearm under federal law and that he therefore did not meet the statutory criteria. *See* § 790.06(2)(n), Fla. Stat. The question before the Court is whether the Department correctly relied on the NICS result to deny R.C.'s application.[1] The answer is no.

A NICS result does not mean an individual is prohibited from purchasing or possessing a firearm. Instead, the NICS provisions

[1] The dissent makes much of preservation. Despite our best efforts, sometimes opinions read like ships in the night—as if they are written on entirely different cases. As we have already set out in Part II of this opinion, the Department informed R.C. that his application was denied because of the NICS result. The dissent acknowledges that R.C. then repeatedly "disputed that the information [the Department] had received supported the legal conclusion that [R.C.] was disqualified." Dissenting op. at 48 (Kelsey, J.). This is the precise question we now decide. After the hearing, the Department's final order concluded that it "correctly applied Section 790.06(2)(n), Florida Statue [sic], as the Department has received information . . . that [R.C.] is prohibited under Federal law from possessing a firearm pursuant to [NICS]."

regulate the conduct of federally licensed firearm dealers through a background check system. A licensed dealer is required to attempt to run a customer's name through the NICS database before selling a firearm. If the check comes back with disqualifying information, the *dealer* cannot proceed with the sale. 18 U.S.C. § 922(t)(1). But this provision does not proscribe the individual customer's conduct. The United States Code governs this area: a "*licensed dealer* shall not transfer a firearm to any person" unless the dealer first complies with the NICS requirements. 18 U.S.C. § 922(t)(1) (emphasis added).

A different provision of federal law regulates an individual's conduct: "It shall be unlawful for *any person* . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess . . . any firearm . . . or to receive any firearm . . . ." 18 U.S.C. § 922(g)(1) (emphasis added). Congress specifically *excluded* individuals who have had their civil rights restored from the definition of "conviction." *See* 18 U.S.C. § 921(a)(20) ("Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter"). Florida law is the same. *See* § 790.23(2)(a), Fla. Stat. (2020) (providing exemption from the prohibition against possession or control of a firearm for persons

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The question was presented *and* passed upon by the lower tribunal. And then on appeal, a third of the argument in R.C.'s initial brief was devoted to discussion of this same question—including a section titled "A positive NICS check is not dispositive that an individual is a prohibited person." The question we answer today was preserved below, argued in the initial brief, and was properly before the Court *before* supplemental briefing was ordered. Along with a supermajority of this Court, I opposed the supplemental briefing order. But our internal rules permitted only five judges to issue the order over the objection of the majority. This opinion relies exclusively on the record and the original briefing.

"[c]onvicted of a felony whose civil rights and firearm authority have been restored").

The Department cited section 790.06(2)(n) to support its denial of R.C.'s application. That section states, "The Department of Agriculture and Consumer Services shall issue a license *if the applicant* . . . [i]s not prohibited from purchasing or possessing a firearm by any other provision of Florida or federal law." § 790.06(2)(n), Fla. Stat. And if R.C.'s firearm rights have been restored, he is not prohibited from possessing a firearm. *See* 18 U.S.C. § 921(a)(20); § 790.23(2)(a), Fla. Stat.[2]

The Department now raises a new argument to support its denial of R.C.'s application. It now claims the NICS result prohibits R.C. from *purchasing* a firearm under federal law. But again, this is not correct. The NICS provisions, discussed above,

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[2] We reject the notion that by applying this plain statutory language we somehow ignore or "expan[d] the statutorily-authorized process." Dissenting op. at 34 (Kelsey, J.). We simply apply the law as it is written. The dissent apparently favors the review process for the sale of firearms by federally licensed dealers over the application process the Legislature created for concealed-carry licenses. But the question is not which process we prefer. Perhaps the dissent is correct that the NICS appeal process provides an "adequate point of entry for applicants to challenge" their NICS results. Dissenting op. at 40 (Kelsey, J.). And if this case had anything to do with a federally licensed dealer's sale of a firearm, we might also discuss the adequacy of those provisions. But since this is a concealed-carry case we will leave that discussion for another day. Our only inquiry is what the concealed-carry law compels. There is not a single reference to NICS in the entire concealed-carry chapter. Its total absence from the controlling statute would be rather odd if it were the system that, as the Department and the dissent contend, serves as the mechanism for approval and appeal of concealed-carry licenses. If the Legislature wishes to make concealed-carry licenses contingent on the federal regulations for licensed-firearm sales, then the Legislature can say so. But it has not, and neither this Court nor the Department can change the law.

do not regulate an individual's ability to possess *or* purchase firearms but govern only their sale by federally licensed dealers. Because they do not regulate the individual customer, if a dealer proceeds with a sale despite the NICS result it is the dealer who violates the NICS provisions, not the customer.

The NICS result, therefore, is not dispositive in determining whether R.C. is prohibited from possessing or purchasing a firearm under federal or Florida law.[3] Because the Department relied exclusively upon the NICS result, it presented no evidence to support the denial. But now, because that core legal conclusion is incorrect, the Department's final order is left without competent, substantial evidence.

B. The Department's Policy Arguments

The Department advances several policy arguments for the denial of R.C.'s application. The Department points out that it is not provided with the underlying basis for NICS's conclusion that R.C. is "NICS ineligible" due to a "felony conviction." That is all the information it gets. So the Department contends that, because it does not know the basis for the result, it cannot effectively determine whether the restoration documents provided by an applicant apply to the NICS disqualification.

The Department asserts that, although R.C. has provided restoration documents from Illinois, there remains a possibility of

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[3] Though the Department has not disputed R.C.'s rights restoration, we reach no conclusion on the authenticity of the documents R.C. presented. *See Douglas v. Buford*, 9 So. 3d 636, 637 (Fla. 1st DCA 2009) (noting that the appellate court is "precluded from making factual findings ourselves in the first instance."). Nor do we conclude he is not prohibited from purchasing or possessing a firearm for a reason other than the Illinois felony conviction—a possibility the Department posits without having produced any evidence. But that determination is precisely why section 790.06 exists. It is the Department's statutory responsibility to determine whether R.C. is actually prohibited from possessing or purchasing a firearm.

some other disqualification from somewhere else. But the Department has no evidence of any other disqualification. And the possibility of an unknown disqualification exists in every concealed carry application. The denial of a constitutional right cannot stand on conjecture. *See* U.S. Const. amend. II; Art. I, § 8, Fla. Const; *Norman*, 215 So. 3d at 22 (plurality opinion) (concluding that Florida's concealed-carry statutory scheme is the channel through which "the right of Floridians to bear arms for self-defense outside of the home" is exercised).

The Department also argues that, if this Court applies the law as it is written, the Department "would be required to give a concealed weapons license to everyone who disputed their NICS disqualification . . . ." Quite the contrary, the law requires the Department to issue the license unless the applicant is prohibited by Florida or federal law. Determining an applicant's eligibility is the Department's responsibility. The Department must evaluate the evidence and reach a reasoned conclusion.

Policy arguments cannot free the Department from the written law. A felon flagged in NICS may be prohibited from possessing or purchasing a firearm—most probably are. But a NICS result is only a starting point in the inquiry into an applicant's eligibility.[4] It is not the NICS result that is a

[4] As a part of the Department's eligibility review process, it is to have an applicant "processed for any criminal justice information." § 790.06(6)(a), Fla. Stat. The dissent puts great weight on this provision and uses it as the entry point for insertion of several unrelated regulations into the concealed-carry statute. All of which we reject. Though it does not affect the outcome here, we note that it is not clear that the NICS result is "criminal justice information" in the first place. This is because criminal justice information "means information on individuals *collected or disseminated as a result of arrest, detention or the initiation of a criminal proceeding* . . . ." § 943.045(12), Fla. Stat. (2020) (emphasis added). For example, an arrest affidavit, an indictment, or a judgment and sentence, is "collected or disseminated" because of an arrest, detention, or criminal proceeding. But a NICS result is information that is solely created and "disseminated as a result of" a federally licensed firearm dealer seeking to sell a firearm.

prohibition on possession or purchase of a firearm. Rather, it is the conviction without a restoration of rights. The NICS result may be a sign that points toward prohibition, but it is not prohibition itself.

C. Entitlement to a Formal Hearing

Because of its misinterpretation of the substantive statutes, the Department deprived R.C. of his right to a formal evidentiary hearing. The denial of the hearing was premised entirely on the incorrect legal conclusion that the Department was bound to the NICS result.

But as we have seen, NICS is not dispositive. There is then a disputed issue of material fact affecting R.C.'s substantial interests. The Department contends he is prohibited from possessing or purchasing a firearm and R.C. has presented evidence that his rights have been restored. § 120.569(1), Fla. Stat. (entitling a party whose substantial interests have been determined by an agency to a hearing under section 120.57(1) "whenever the proceeding involves a disputed issue of material fact"). R.C. is therefore entitled to a formal hearing under section 120.57(1) where "[a]ll parties shall have an opportunity to respond, to present evidence and argument on all issues involved" and "[f]indings of fact shall be based upon a preponderance of the evidence . . . ." § 120.57(1)(b), (j), Fla. Stat.[5]

The formal hearing is the Department's opportunity to carry its burden by presenting evidence of disqualification. It is also

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And rather than the actual judgment and sentence itself, the NICS result is a third party's review of the underlying information and a reflection of the conclusions the third party has drawn from the actual criminal justice information. But we need not decide here whether the Department can properly use a NICS result in their application review process. We only conclude that it is not sufficient, by itself, to support a denial.

[5] We disagree that conducting a routine evidentiary hearing under the Administrative Procedure Act is a "novel creation of an evidentiary appeal." Dissenting op. at 41 (Kelsey, J.). And unlike

R.C.'s opportunity to present evidence challenging the basis of that disqualification. The Department erred in denying R.C.'s request for a formal hearing under section 120.57(1).

IV. Conclusion

The Department's finding of fact that R.C. is prohibited from possessing a firearm is not supported by competent, substantial evidence. The Department's legal conclusion that the NICS result required the denial of R.C.'s concealed carry application is erroneous. We reverse and remand for further proceedings.

RAY, C.J., and LEWIS, ROBERTS, ROWE, OSTERHAUS, JAY, M.K. THOMAS, NORDBY, and TANENBAUM, JJ., concur.

B.L. THOMAS, J., concurs with opinion, in which ROBERTS, JAY, M.K. THOMAS, and TANENBAUM, JJ., join, and in which LEWIS, ROWE, and WINOKUR, JJ., join in Part I.

WINOKUR, J., concurs with opinion, in which LEWIS, B.L. THOMAS, ROBERTS, ROWE, M.K. THOMAS, and TANENBAUM, JJ., join.

MAKAR, J., concurs in part and dissents in part with opinion, in which BILBREY and KELSEY, JJ., join in part.

KELSEY, J., dissents with opinion, in which BILBREY, J., joins, and in which MAKAR, J., joins in Part I.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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the NICS process, the APA process is expressly provided for in the concealed-carry licensing statute. § 790.06(6)(c)2., Fla. Stat.

B.L. THOMAS, J., concurring.

The Department's actions constituted an egregious abuse of administrative power, for two reasons.[1]

I.

First, the Department unlawfully refused to grant Appellant's request for a formal administrative hearing under sections 120.52(13), 120.569, and 120.57(1), Florida Statutes, to challenge the Department's decision denying his request for the license, which adversely affected his substantial interest. *See Tieger v. Sch. Bd. of Palm Beach Cnty.*, 717 So. 2d 172, 173–74 (Fla. 4th DCA 1998) (holding that a school board was required to grant formal administrative hearing where disputed issues of material fact had been raised); *cf. Rozenweig v. Dep't of Transp.*, 979 So. 2d 1050, 1052 (Fla. 1st DCA 2008) (holding that a party waived its right to formal administrative hearing where disputed facts arose during informal hearing but party never requested formal hearing under section 120.57(1), Florida Statutes, "at any time"). Appellant never waived any right to challenge the Department's decision in a formal administrative hearing.

Appellant made the precise argument below that is raised here – that Appellant was entitled to challenge the Department's denial of the license application in a formal administrative hearing under section 120.57(1), Florida Statutes (2020), on the ground that Appellant's civil rights had been restored. Therefore, Appellant preserved this argument for appellate review. *State v. Crofoot*, 97 So. 3d 866, 868 (Fla. 1st DCA 2012) (holding that State preserved "all aspects" of its argument by making general hearsay objection); *Aills v. Boemi*, 29 So. 3d 1105, 1108-09 (Fla. 2010)

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[1] Appellant moved for attorney's fees under section 57.111(2), Florida Statutes (2020) and section 120.595(5), Florida Statutes, which provides in part that this Court "may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that . . . the agency action which precipitated the appeal was a gross abuse of the agency's discretion." The Department has not responded to the motion.

(holding that to preserve error or argument on appeal, party must make timely objection, state a legal ground, and assert same argument on appeal as made below).

A denial of a license to carry a concealed firearm, grounded in both statute and state and federal constitutional protections, is a "substantial interest" for which section 120.52(13)(a) of Florida's Administrative Procedures Act was designed to protect. *See S.J. v. Thomas & Escambia Cnty. Sch. Bd.*, 233 So. 3d 490, 499–501 (Fla. 1st DCA 2017) (holding that a school board's assignment for student discipline affected the student's substantial interests and mandating an administrative final order to allow appeal); *Maverick Media Grp. v. State Dep't of Transp.*, 791 So. 2d 491, 492 (Fla. 1st DCA 2001) (holding that a billboard-sign company had standing to challenge a permit denial based on allegation that existing permitted billboard violated state law); *Silver Show, Inc. v. Dep't of Bus. & Prof'l Reg.*, 706 So. 2d 386, 388 (Fla. 4th DCA 1998) ("Because a licensee's right to operate under an alcoholic beverage license involves a substantial interest of the licensee, the Administrative Procedures Act (APA) is necessarily involved.") (footnote relying on statute granting temporary license as "a matter of right" omitted). The entitlement to a license to carry a concealed firearm is no less of a substantial interest under section 120.52(13)(a) than the right to sell alcoholic beverages.

Because Appellant has shown that he otherwise qualifies for a concealed firearm license, on remand the Department must establish by a preponderance of the evidence, in a formal administrative hearing, that Appellant is *not* entitled to the license to carry a concealed firearm. § 790.06(2), Fla. Stat. (2020):

> The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue. *Florida Department of Transportation v. J.W.C. Company*, 396 So. 2d 778 (Fla. 1st DCA 1981). Thus, the majority is correct in its observation that appellants had the burden of presenting evidence of their fitness for registration. The majority is also correct in its holding that the Department had the burden of presenting evidence that appellants had

> violated certain statutes and were thus unfit for registration.

Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996) (quoting *Osborne Stern & Co., Inc. v. Dep't of Banking & Fin.*, 647 So. 2d 245, 250 (Fla. 1st DCA 1994) (Booth, J., concurring and dissenting)).

II.

Second, the Department's erroneous denial of Appellant's statutory entitlement to receive a license to carry a concealed firearm under chapter 790, Florida Statutes, also violated rights grounded in the Second Amendment to the United States Constitution.

Appellant may legally purchase and possess a firearm under both state and federal law because his civil rights and "firearm authority" have been restored, as noted in the majority opinion. *See* 18 U.S.C. § 922(g)(1);[2] § 790.23(3), Fla. Stat. (2020). Therefore, he is entitled to receive a license to carry a concealed firearm for self-defense outside the home, absent competent substantial evidence to the contrary.

To hold otherwise would violate the entire licensing structure provided in section 790.06, Florida Statutes (2020). In addition, such a holding would likely violate both state and federal constitutional rights of citizens to bear arms for self-defense outside the home. *See* Amend. II, U.S. Const.; *Wrenn v. D.C.*, 864 F.3d 650, 657, 666–67 (D.C. Cir. 2017) (holding that the individual right to carry firearms outside the home for self-defense is within the core of Second Amendment protections and holding that a law

[2] The Eastern District of Pennsylvania found this statute violated the Second Amendment as applied to a citizen who had been denied a state license to carry a firearm. *See Miller v. Sessions*, 356 F. Supp. 3d 472, 475 n.2, 481–84 (E.D. Pa. 2019) (applying a framework developed by the Third Circuit for determining whether statutes as applied to a particular citizen violate the Second Amendment).

prohibiting the issuance of a concealed-carry license except for "good reason" was categorically barred by the Second Amendment); Art. I, § 8 Fla. Const. Recently, the United States Supreme Court agreed to consider whether New York violated the Second Amendment by denying a request for a concealed-carry license. *New York State Rifle & Pistol Ass'n, Inc. v. Beach*, 354 F. Supp. 3d 143 (N.D.N.Y. 2018), *aff'd*, 818 Fed. Appx. 99 (2d Cir. 2020), *cert. granted*, 2021 WL 1602643 (U.S. Apr. 26, 2021) (renumbered No. 20-843).

It also bears noting that if Appellant were not legally entitled to purchase or possess a firearm, by applying for a concealed firearm license, he would actually be *applying* for state-sanctioned permission to commit a second-degree felony, punishable by fifteen years in state prison.[3] Such a proposition is absurd on its face.

The Legislature has completely occupied the field regarding the "regulation of the bearing of concealed weapons or firearms for

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[3] (1) It is unlawful for any person to own or have in his or her *care*, *custody*, *possession*, or *control* any firearm . . . if that person has been:

. . . .

(e) Found guilty of an offense that is a felony in another state . . . and which was punishable by imprisonment for a term exceeding 1 year.

(2) This section shall *not* apply to a person:

(a) Convicted of a felony whose civil rights and firearm authority have been restored.

. . . .

(3) [A]ny person who violates this section commits a felony of the second degree, punishable as provided in s. 775.082, s.775.083, or s. 775.084.

§ 790.23, Fla. Stat. (emphasis added).

self-defense to ensure that no honest, law-abiding person who qualifies . . . is *subjectively or arbitrarily denied* his or her rights." § 790.06(15), Fla. Stat. (emphasis added). Appellant has been a law-abiding citizen for half a century and is legally entitled to purchase and possess a firearm. Section 790.06(2)(n), Florida Statutes, states that the Department must issue a license to carry a concealed firearm to Appellant unless the Department can prove he is "prohibited from purchasing or possessing a firearm by any other provision of Florida or federal law." The unambiguous statutory text does *not* state that the Department may refuse to issue the license if the applicant is prohibited from the sale of a firearm by a "federally licensed firearm dealer."

Thus, unless an applicant is prohibited from any lawful purchase or possession of a firearm, he or she is entitled to a license. *See Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (noting courts do not possess constitutional authority to extend the reach of unambiguous statutes). Just as a court cannot add words to this statute, neither may the Department add words that were not enacted by general law. To do so would violate the state's strict separation of powers under article II, section 3 of the Florida Constitution. *See B.H. v. State*, 645 So. 2d 987, 994 (Fla. 1994) (holding that the Legislature may not delegate power to an administrative agency to define elements of a felony). Just as the Legislature may not delegate power to an administrative agency, it may not delegate its authority to define substantive law. *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991) (holding that "under the doctrine of separation of powers, the legislature may not delegate the power to enact laws . . . to any other branch"). To accept the Department's argument would allow it to add additional requirements for obtaining a license to carry a concealed firearm in violation of the statute and separation of powers.

The Department must grant Appellant a formal administrative hearing, where it will be the Department's burden to come forward with a preponderance of evidence that Appellant is not entitled to receive the license to carry a concealed firearm

for self-defense. If the Department is unable to meet its burden, it must issue the license to Appellant.

Thus, I concur with the majority opinion.

WINOKUR, J., concurring.

I agree in full with the majority opinion. I write to add one observation about the Department's actions in this case. In particular, I question why the Department relies on paragraph (n) of section 790.06(2), Florida Statutes, to disqualify an applicant with a felony conviction.

Section 790.06(2) provides a list of qualifications in order to have a right to a license to carry concealed firearms. One qualification is that the applicant "[i]s not ineligible to possess a firearm pursuant to s. 790.23 [criminalizing possession of a firearm by a convicted felon] by virtue of having been convicted of a felony." § 790.06(2)(d), Fla. Stat. This provision appears to me to be the legislative prohibition on concealed-carry licensure for convicted felons. It has been part of section 790.06(2) since the subsection took its current form in 1987. *See* Ch. 87-24, § 2, Laws of Fla. R.C., or any applicant with a felony conviction, could be denied a license to carry concealed firearms based on this provision alone.

In contrast, the provision that disqualifies a person who is "prohibited from purchasing or possessing a firearm by any other provision of Florida or federal law" was not added to the statute until 2000. *See* Ch. 2000-258, § 61, Laws of Fla. This is the provision (paragraph (n) of section 790.06(2)) on which the Department relies to disqualify felons, in spite of the fact that the statute explicitly disqualifies felons in paragraph (2)(d), and has done so since long before the "federal law" provision was added.*

The reason that R.C. may be disqualified under federal law for purchasing or possessing a firearm is a felony conviction: the

* Prior to 2003, the Department of State was responsible for issuing concealed-carry licenses. At that time this responsibility

same felony conviction, in fact, that would disqualify him under paragraph (2)(d). So why does the Department invoke federal law to disqualify R.C. when the applicable statute has always disqualified felons, even before the "federal law" provision was added?

It seems that this choice by the Department allows it to claim that it must rely on the NICS system, which, as the majority opinion lays out, "regulate[s] the conduct of federally licensed firearm dealers through a background check system." Maj. op. at 6. Because NICS is part of a federal system of firearm regulation, the Department can claim that taking action that could be considered contrary to a NICS result interferes with federal firearm regulation.

I disagree. The Florida Statutes contain dozens, perhaps hundreds, of provisions where licensure or permitting is conditioned on an applicant's felony record. How other agencies determine whether an applicant has a felony conviction that may affect licensure is not in the record, but it seems likely that it never involves NICS, which as the majority opinion notes, explicitly applies to sale of firearms from a licensed dealer. In short, it appears that the Department can disqualify felons without any resort at all to the federal firearms regulation system, including NICS. Its choice to involve federal law to disqualify felons pursuant to paragraph (2)(n) has unnecessarily led to the issues presented in this case. For this reason, I am wary of the Department's claim that a reversal here implicates federal law.

MAKAR, J., concurring a little, dissenting mostly.

Restoration of civil rights—whether it be the right to vote or, as in this case, the right to keep and bear arms in self-defense—is of critical importance to former felons who demonstrate their entitlement to regain such rights. I agree that a more formal administrative hearing in this case would be helpful, but I would

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was switched to the Department of Agriculture and Consumer Services. *See* Ch. 2002-295, § 10, Laws of Fla.

go no further and thereby avoid judicially deconstructing the long-standing and vital process that two of Florida's most important governing bodies have used for decades to protect public safety by ensuring that firearms and concealed weapons licenses are issued to only those persons who demonstrate their eligibility under federal and Florida laws.

I.

As background, R.C. seeks a Florida concealed weapons license, but he was convicted in 1969 of a state law felony in Illinois (stealing an 8-track tape player). He has documents that, if proven valid, show that his conviction was annulled by an Illinois gubernatorial clemency order and that his rights of citizenship were restored in that state in 1971. He also presents a copy of an Illinois concealed carry license (but Florida does not recognize it because Illinois is not one of the states with which Florida has entered a reciprocity agreement).[1]

R.C. has a big, but correctable, problem: the National Instant Criminal Background Check System, aka NICS, shows that R.C. is "ineligible" to possess or purchase a firearm due to a "felony conviction." The NICS background check does not reflect whether R.C.'s "felony conviction" was the 1969 felony; nor does it shed light on whether the "felony conviction" was annulled by Illinois's governor, as R.C. contends (and his documentation appears to support). It simply says he's "NICS ineligible" due to a "felony conviction," period.

Because NICS identifies R.C. as ineligible based on a felony conviction, he cannot possess a firearm in Florida and cannot purchase one from a firearms dealer. If R.C. were detained by police authorities who checked NICS, it would reflect his ineligibility; if he possessed a firearm in Florida, probable cause

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[1] *See* Important Information Concerning Concealed Weapon License Reciprocity with Other States, Florida Department of Agriculture and Consumer Services, at https://www.fdacs.gov/content/download/7444/file/reciprocity-list.pdf.

would exist to arrest him for unlawful possession of a firearm by a felon. § 790.23(1), Fla. Stat. (2021). It would be his defense that his civil rights were restored.[2] If he attempted to purchase a firearm from a Florida firearms dealer, a background check including NICS would likewise show he is ineligible to purchase a firearm; a sale to him would be unlawful.

The good news is that R.C.—and those similarly situated—can seek correction of information in the NICS database via a well-established, but apparently sometimes frustrating, process. He can file a request to correct NICS data with either the Florida Department of Law Enforcement (FDLE)—which is the exclusive law enforcement agency in Florida with authority to access and correct errors in the confidential NICS database—or the Federal Bureau of Investigation (FBI). This process is often termed an "appeal," but in truth it is really the exclusive method for checking and correcting NICS information and records. *See* 28 C.F.R. § 25.10 (2021). The process to appeal an adverse decision is specified by administrative rule. *See* Rule 11C-6.009, Sale and Delivery of Firearms, Fla. Admin. Code (2021).

Turning to this case, R.C. first filed an application with the Florida Department of Agriculture and Consumer Services (Department), the state agency tasked with processing applications for concealed weapons licenses (CWL), asserting that he was entitled to a CWL. His application, which is completed under oath, indicates he checked the box "No" in responding to the question "Have you ever been convicted of a felony?" He answered "Yes" to the question "Have you received firearms training?" apparently via a basic handgun course he took in 2018.

To fulfill its responsibilities, the Department must ensure that it issues CWLs to only those persons who are eligible—a titanic and complicated task because the list of requirements and

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[2] *Hernandez v. State*, 289 So. 2d 16, 17 (Fla. 3d DCA 1974) (finding that section 790.23 "exempts those convicted felons whose civil rights have been restored. In the prosecution of the offense the state is not required to prove the non-existence of the exception. It is a matter of defense, to be established by the defendant.").

disqualifications is lengthy (see Appendix). Here, as required by law, the Department submitted a full set of R.C.'s fingerprints to FDLE to perform its statutory function of obtaining any state or federal "criminal justice information" pertaining to R.C. and reporting the results to the Department. § 790.06(6)(a), Fla. Stat. (2021) (The Department "shall forward the full set of fingerprints of the applicant to [FDLE] for state and federal processing, provided the federal service is available, to be processed for any criminal justice information as defined in s. 943.045.").

The Department, which is not a criminal justice agency, has no legal authority to access or assess the "criminal justice information" sought, which only FDLE (or FBI) may review and correct, as necessary. For this reason, the Department must rely on FDLE's determination of an applicant's NICS status as well as the error-correction function that only FDLE (or FBI) can perform related to purported errors in the NICS database.

For example, in this case, FDLE reviewed the NICS database and determined that R.C. was "ineligible" to have a CWL due to a "felony conviction." As both FDLE and the Department have explained in supplemental legal briefs,[3] the Department has no authority to question, verify, or correct information provided to it by FDLE. Instead, only FDLE (or FBI) are permitted by federal law to access, correct, or remedy errors in the NICS database via a process that must be initiated by the CWL applicant.

R.C.'s attorney says that R.C. pursued a correction of his records in NICS via a request to FDLE but that FDLE verbally advised him that R.C. remains ineligible. No documentation in the

[3] The Court ordered supplemental briefs, including one from FDLE—a critically-affected non-party—based on the then existing internal operating procedure (IOP) that allowed such briefs in an en banc proceeding if at least five members approved. IOP 6.9 (2019). That IOP was changed soon thereafter to require a majority vote. IOP 6.9 (2021).

record exists to confirm that a request was made or that a response was received, however.

An informal hearing was held telephonically, attended by the hearing officer and R.C.'s counsel, who presented evidence including the documents indicating that R.C.'s rights had been restored in Illinois; very limited legal argument was allowed. The Department did not attend, but thereafter entered a final order denying R.C.'s CWL application. The reasons were that (a) FDLE had reported that R.C. was ineligible based on its review of the NICS database, and (b) R.C.'s counsel admission that FDLE had denied R.C.'s request to correct the NICS database. The Department has no legal authority to make an independent determination about the validity of NICS records and, instead, must rely on FDLE's determination, review, and resolution of claimed errors in NICS information. Because NICS indicated that R.C. was ineligible, and R.C.'s attorney admitted that his request to FDLE was denied, the Department had no choice but to deny R.C.'s application, resulting in this appeal and hearing en banc.[4]

II.

To begin, it has been the Department's longstanding responsibility to administer the CWL program. For almost forty years, Republican and Democratic commissioners alike have overseen the program. Since 1987, the Legislature has required that the Department rely upon FDLE to provide its assessment of confidential criminal justice information that the Department may not access or correct. Ch. 87-24, Laws of Fla. (codified at § 790.06(2), Fla. Stat.). By legislative design, a symbiotic relationship between the Department and FDLE in the licensing process has existed since the program's inception whereby the Department (a) processes CWL applications; (b) relies on FDLE's access to criminal background checks of applicants, including NICS eligibility determinations; and (c) must necessarily base its final determinations on information FDLE provides as the exclusive criminal justice agency in Florida (with the sole

[4] The Court voted to hear this case en banc prior to issuance of an opinion in this and pending related cases. *See* IOP 6.2 (2021).

authority to process requests to correct claimed errors in the NICS database).

What is problematic is that the Department, whether in an informal or formal hearing, is hogtied by its inability to access or correct the confidential criminal justice information upon which the CWL program is based. On this point, the parties, along with FDLE as an affected non-party, were asked to file supplemental briefs on the following critical, if not decisive, issues:

> May the Florida Department of Agriculture and Consumer Services (DACS) rely on a National Instant Criminal Background Check System (NICS) query result to determine whether an applicant is qualified for a Florida concealed carry license? Is DACS required to make an independent determination, and authorized to conduct an evidentiary hearing in doing so, to resolve a disputed finding of an applicant's ineligibility; or may it rely on the availability of the Firearm Ineligibility Appeal process administered by the Florida Department of Law Enforcement (FDLE)? Does the FDLE appeal process apply to both concealed carry licenses and firearm purchases?[5]

In response to these questions, both FDLE and the Department confirmed that (a) the Department must rely on the NICS query result from FDLE in determinations about CWL applications; (b) the Department has no authority to make an independent determination of whether an applicant is NICS eligible; and (c) the Department may rely on the availability of the process for corrections to NICS information performed by FDLE (or the FBI).

Mucking up the existing legislatively structured CWL system is unwise and potentially hazardous to public safety as the

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[5] En banc hearing in this case was ordered because of its "exceptional importance," such that the exceptionally important issues passed upon (including those addressed in supplemental briefing) ought to be certified so our supreme court may accept review of them in its discretion. *See* IOP 6.4 (2021).

Department and FDLE warn. That's because the Department is not a law enforcement agency and has no independent legal authority to make pronouncements about the eligibility of an applicant under the NICS system. As the Department points out, it cannot know the specific reasons for a NICS denial "because information underlying NICS eligibility determinations cannot be obtained by [the Department] as that information is privileged and may only be provided to a law enforcement agency. *See* 28 CFR 25.10(a)." Similarly, FDLE notes that the Department is "precluded from accessing these federal databases or to receive the information contained within them . . . [and] must rely on FDLE, as a criminal justice agency and the state [Point of Contact under federal law] to conduct these background checks." Only "an individual [such as R.C.] who receives a NICS denial can receive the specific reason(s) for their denial by using the FDLE NICS appeal process."

Because FDLE is prohibited by law from sharing confidential NICS information with the Department, the Department can't even determine (let alone adjudge) whether R.C. ineligibility is due to his 1969 felony conviction in Illinois or some other unrelated incident. As the Department notes, while R.C.'s "NICS disqualification shows it is related to a felony conviction generally, it is entirely possible that the exclusion in [R.C.'s] case relates to a different criminal matter."[6] And because the Department "is prohibited by federal law from knowing the exact reason for the NICS denial, [the Department] must be able to rely on NICS qualification to ensure that prohibited persons are not issued concealed weapons licenses." The Department persuasively points out that it "would be an absurd result to require [the Department] to call witnesses and relitigate . . . the facts underlying a NICS

[6] FDLE likewise notes that the Department "would be unable to know if the documents that were provided were actually related to a disqualifying event as they did not conduct the NICS inquiry and are not able to know the basis for the denial" because the Department is not a criminal justice agency.

disqualification because [the Department] is not authorized to receive the information about the basis for the disqualification."

Given what's at stake, the Department and FDLE paint a foreboding future if the Department must litigate with license applicants yet be unable to access the confidential information necessary to make momentous decisions when persons with felony convictions seek CWLs:

> If the Court adopted [R.C.'s] position, [the Department] would be required to give a concealed weapons license to everyone who disputed their NICS disqualification as [the Department] would be unable to prove specifically why an applicant was disqualified. *This would defeat the entire purpose of the nationwide system of NICS and present a grave risk to public safety.*

(emphasis added). For similar reasons, the Department warns that "[i]ndividuals with disqualifying criminal or mental health records would receive concealed weapons licenses, despite being federally disqualified from owning or possessing a firearm." The net effect of allowing applicants to circumvent the NICS system by forcing the Department to adjudge what it is legally prohibited from doing is a recipe for dysfunction.

It can't be stressed enough that the structure of the licensing process relies upon a rational and available method for correcting NICS records. An aggrieved license applicant is specifically told about and directed to a readily available and exclusive administrative remedy at FDLE (or the FBI) to correct errors. The Department has no legal authority to adjudge whether NICS records are accurate or not or whether a records review by FDLE or the FBI was done correctly. As FDLE notes, the Department "does not have the authority to override or remove the disqualification of an individual who is ineligible from owning, possessing or purchasing a firearm." Chaos would likely ensue if the Department is permitted to issue orders adjudging that an applicant who is NICS ineligible is nonetheless entitled to possess a firearm and a CWL. Who's to be believed? FDLE, the top Florida criminal justice agency with the exclusive authority to access and correct the NICS database? Or the Department, which lacks any

such authority and isn't even a criminal justice agency? What are criminal justice agencies and law enforcement officers to do when the NICS database says an individual is NICS ineligible but they are handed a final order from the Department saying he is eligible? Unwarranted confusion will result and an adverse impact on public safety is likely, as both FDLE and the Department warn.

As this case shows, the Department works hand in glove with FDLE in the licensing process, which creates a dual bureaucracy with all its attendant delays and annoyances but has worked for the most part as the data reflects. Keep in mind that as of April 30, 2021, the Department has issued 2,363,901 concealed firearms/weapons licenses, which is almost double what it had issued as of 2014. The number of applications each year is huge and perhaps overwhelming at times. From July 1, 2019 to June 30, 2020, the Department received 163,934 applications for concealed firearms/weapons licenses, issued 159,977 licenses, and denied 5,367 based on incomplete documentation and 5,039 based on the applicant's ineligibility.[7] A much higher number of applications since July 1, 2020, have been filed, approximately 296,100 with a decline in denials based on ineligibility (3,565).[8]

In most instances, an applicant has no adverse criminal background information and, assuming all other statutory requirements are met, obtains a license; data reflects about a 97.6% rate of issuance for July 1, 2019 to June 30, 2020. Fla. Dep't of Agric. & Cons. Servs. Div. of Licensing, *Concealed Weapon or Firearm License Reports Applications and Dispositions by County July 01, 2019 – June 30, 2020*,

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[7] Fla. Dep't of Agric. & Cons. Servs. Div. of Licensing, *Concealed Weapon or Firearm License Reports Applications and Dispositions by County July 01, 2019 – June 30, 2020*, https://www.fdacs.gov/content/download/84469/file/07012019_06302020_cw_annual.pdf.

[8] Fla. Dep't of Agric. & Cons. Servs. Div. of Licensing, *Concealed Weapon or Firearm License Reports Applications and Dispositions by County July 01, 2020 – June 30, 2021*, https://www.fdacs.gov/content/download/92523/file/07012020_06302021_cw_annual.pdf.

https://www.fdacs.gov/content/download/84469/file/07012019_06302020_cw_annual.pdf. Those persons whose applications result in the discovery of adverse criminal justice information are instructed by the Department that they must turn to FDLE or the FBI to pursue the remedial process that is specifically available for this purpose (an "appeal"). These applicants have the responsibility to pursue this available corrective measure. It is not the Department's obligation to do so, nor is it that of FDLE. As a prominent Florida firearms handbook says, "in the end—it's your responsibility—not theirs to follow thru on any correction, and make it happen." JON H. GUTMACHER, FLORIDA FIREARMS: LAW, USE AND OWNERSHIP 54 (9th Ed. June 2017).

Rather than judicially restructure the CWL licensing system, a better path is to allow the Department to develop and adjudge a factual record within its realm of authority but to respect the legal process in place for correcting errors in the NICS database. Until now, the Department appears to have provided at least some degree of accommodation that allows an applicant to pursue corrective action from FDLE via a firearm ineligibility determination before the Department issues a final order. § 790.06(6)(c)2., Fla. Stat. Where an applicant makes no effort to pursue this available corrective remedy, the Department is justified in denying licensure; likewise if an applicant fully exhausts his "appeal" to FDLE (or the FBI) and his NICS ineligibility is affirmed or unchanged, the Department is justified in denying licensure.

The benefit of a more formal hearing is to allow for the fullest development of disputed facts to assist in the overall process of determining the truth as to the status of a former felon who claims and has documentation that his rights have been restored. The informal hearing in this case was perfunctory, argumentative, and largely unconstructive. In a more formal hearing, an applicant would seek admission of documents to be evaluated for authentication and relevance and provide some degree of relevance as to whether an applicant's rights have been restored and the scope of such rights. For instance, R.C. has presented documents that facially appear to support his claim of restored rights in Illinois, but the documents are not self-authenticating and disagreements may exist as to the scope and application of such

documents in Florida once authenticated. The Department could issue an order that finds competent substantial evidence to support a factual finding that an applicant has had his or her rights restored, but that determination has no final conclusive effect because the only lawful way to issue a license is to be NICS eligible. The Department could condition a grant of a license on the applicant presenting the order to FDLE, who would then have the exclusive authority to make a final determination. While the Department could not take final action by granting a license where a disagreement exists between the NICS database and what the evidence may show, it would provide a means of partially adjudging important facts that may prove useful in the NICS correction process and, eventually, in the issuance of a license.

* * *

In conclusion, the Legislature long ago set up a process that places the responsibility on the Department to process applications for concealed weapons licenses and to work in tandem with FDLE to ensure the accuracy and reliability of the criminal justice information upon which the Department must rely in determining whether applicants—including those with prior felony convictions—are eligible to have a license, to possess a firearm, and to carry a concealed weapon. The Department has no legal authority to make an independent evaluation and adjudication about an applicant's status in the NICS database, a responsibility exclusively in the hands of FDLE and the FBI under federal law. That does not preclude the Department from adjudicating, in part, important factual issues; but it does preclude the lawful issuance of a CWL without a NICS eligible determination, which can be obtained if an applicant successfully pursues the available administrative remedy to correct claimed deficiencies. R.C. was unsuccessful in clearing his NICS record through that process, and it ill serves the public interest to force the Department to exceed its authority by second-guessing and adjudicating matters beyond

its lawful powers and creating a "grave risk to public safety," as FDLE warns.

Appendix

§ 790.06, Fla. Stat. (2021), entitled "**License to carry concealed weapon or firearm,**" states in sections (2) and (3) that:

(2) The Department of Agriculture and Consumer Services shall issue a license if the applicant:

(a) Is a resident of the United States and a citizen of the United States or a permanent resident alien of the United States, as determined by the United States Bureau of Citizenship and Immigration Services, or is a consular security official of a foreign government that maintains diplomatic relations and treaties of commerce, friendship, and navigation with the United States and is certified as such by the foreign government and by the appropriate embassy in this country;
(b) Is 21 years of age or older;
(c) Does not suffer from a physical infirmity which prevents the safe handling of a weapon or firearm;
(d) Is not ineligible to possess a firearm pursuant to s. 790.23 by virtue of having been convicted of a felony;
(e) Has not been:

> 1. Found guilty of a crime under the provisions of chapter 893 or similar laws of any other state relating to controlled substances within a 3-year period immediately preceding the date on which the application is submitted; or
> 2. Committed for the abuse of a controlled substance under chapter 397 or under the provisions of former chapter 396 or similar laws of any other state. An applicant who has been granted relief from firearms disabilities pursuant to s. 790.065(2)(a)4.d. or pursuant to the law of the state in which the commitment occurred is deemed not to be committed for the abuse of a controlled substance under this subparagraph;

(f) Does not chronically and habitually use alcoholic beverages or other substances to the extent that his or her normal faculties are impaired. It shall be presumed that an applicant chronically and

habitually uses alcoholic beverages or other substances to the extent that his or her normal faculties are impaired if the applicant has been convicted under s. 790.151 or has been deemed a habitual offender under s. 856.011(3), or has had two or more convictions under s. 316.193 or similar laws of any other state, within the 3-year period immediately preceding the date on which the application is submitted;

(g) Desires a legal means to carry a concealed weapon or firearm for lawful self-defense;

(h) Demonstrates competence with a firearm by any one of the following:

1. Completion of any hunter education or hunter safety course approved by the Fish and Wildlife Conservation Commission or a similar agency of another state;

2. Completion of any National Rifle Association firearms safety or training course;

3. Completion of any firearms safety or training course or class available to the general public offered by a law enforcement agency, junior college, college, or private or public institution or organization or firearms training school, using instructors certified by the National Rifle Association, Criminal Justice Standards and Training Commission, or the Department of Agriculture and Consumer Services;

4. Completion of any law enforcement firearms safety or training course or class offered for security guards, investigators, special deputies, or any division or subdivision of a law enforcement agency or security enforcement;

5. Presents evidence of equivalent experience with a firearm through participation in organized shooting competition or military service;

6. Is licensed or has been licensed to carry a firearm in this state or a county or municipality of this state, unless such license has been revoked for cause; or

7. Completion of any firearms training or safety course or class conducted by a state-certified or National Rifle Association certified firearms instructor;

A photocopy of a certificate of completion of any of the courses or classes; an affidavit from the instructor, school, club, organization, or group that conducted or taught such

course or class attesting to the completion of the course or class by the applicant; or a copy of any document that shows completion of the course or class or evidences participation in firearms competition shall constitute evidence of qualification under this paragraph. A person who conducts a course pursuant to subparagraph 2., subparagraph 3., or subparagraph 7., or who, as an instructor, attests to the completion of such courses, must maintain records certifying that he or she observed the student safely handle and discharge the firearm in his or her physical presence and that the discharge of the firearm included live fire using a firearm and ammunition as defined in s. 790.001;

(i) Has not been adjudicated an incapacitated person under s. 744.331, or similar laws of any other state. An applicant who has been granted relief from firearms disabilities pursuant to s. 790.065(2)(a)4.d. or pursuant to the law of the state in which the adjudication occurred is deemed not to have been adjudicated an incapacitated person under this paragraph;

(j) Has not been committed to a mental institution under chapter 394, or similar laws of any other state. An applicant who has been granted relief from firearms disabilities pursuant to s. 790.065(2)(a)4.d. or pursuant to the law of the state in which the commitment occurred is deemed not to have been committed in a mental institution under this paragraph;

(k) Has not had adjudication of guilt withheld or imposition of sentence suspended on any felony unless 3 years have elapsed since probation or any other conditions set by the court have been fulfilled, or expunction has occurred;

(l) Has not had adjudication of guilt withheld or imposition of sentence suspended on any misdemeanor crime of domestic violence unless 3 years have elapsed since probation or any other

conditions set by the court have been fulfilled, or the record has been expunged;
(m) Has not been issued an injunction that is currently in force and effect and that restrains the applicant from committing acts of domestic violence or acts of repeat violence; and
(n) Is not prohibited from purchasing or possessing a firearm by any other provision of Florida or federal law.

(3) The Department of Agriculture and Consumer Services shall deny a license if the applicant has been found guilty of, had adjudication of guilt withheld for, or had imposition of sentence suspended for one or more crimes of violence constituting a misdemeanor, unless 3 years have elapsed since probation or any other conditions set by the court have been fulfilled or the record has been sealed or expunged. The Department of Agriculture and Consumer Services shall revoke a license if the licensee has been found guilty of, had adjudication of guilt withheld for, or had imposition of sentence suspended for one or more crimes of violence within the preceding 3 years. The department shall, upon notification by a law enforcement agency, a court, or the Florida Department of Law Enforcement and subsequent written verification, suspend a license or the processing of an application for a license if the licensee or applicant is arrested or formally charged with a crime that would disqualify such person from having a license under this section, until final disposition of the case. The department shall suspend a license or the processing of an application for a license if the licensee or applicant is issued an injunction that restrains the licensee or applicant from committing acts of domestic violence or acts of repeat violence.

KELSEY, J., dissenting.

I dissent on the merits because the majority opinion improperly requires the Department of Agriculture and Consumer Services (DACS) to exceed, and thereby violate, its legislatively delegated authority. I dissent as to procedure because Appellant

failed to preserve the arguments on which the majority bases its ruling. We are not authorized to *reverse* on unpreserved grounds.

I. Lack of Merit.

The majority begins by highlighting that Appellant's known felony disqualification was minor—he stole an eight-track tape player[1] long ago and far away. This seems a de minimis crime, but the majority's analysis apparently would be the same for a "bad" felony conviction. The relative seriousness of an applicant's known felony disqualification is irrelevant to the statutory interpretation and preservation questions before the Court. The majority's statement of "facts," however, is merely unproven allegations, as is the majority's assumption that Appellant has no other criminal convictions. To the contrary, Appellant's counsel stated at the hearing below that Appellant's appeal to the Florida Department of Law Enforcement (FDLE) also resulted in a denial, for unknown reasons that could include additional criminal justice information—which only FDLE is authorized to obtain under Florida and Federal law.

In the face of the Florida Legislature's choice and mandate for use of a specified, detailed, clear, and unambiguous statutory scheme, the majority nevertheless creates a new, expanded system for processing applications for Florida concealed-carry licenses

[1] Eight-track tape players, in use mostly from the mid-1960s to mid-1970s, were the first electronic car accessories that allowed users to play their choice of music—on tape in rectangular plastic cartridges measuring about four by five inches. *See* Eight-Track Tape Player, https://www.encyclopedia.com/history/culture-magazines/eight-track-tapes. Despite later admitting his prior felony conviction, Appellant checked "no" in answer to the question about prior felonies on his application. *See* § 790.06(4)(d), Fla. Stat. (directing that applications contain a warning that "the application is executed under oath and that a false answer to any question, or the submission of any false document by the applicant, subjects the applicant to criminal prosecution under s. 837.06 [perjury]").

outside the statutory process. The majority's new procedure requires DACS to ignore disqualification results that the statute *mandates* must be obtained from FDLE. *See* § 790.06(6)(a), Fla. Stat. (2019) ("The Department of Agriculture and Consumer Services, upon receipt of the items listed in subsection (5), shall forward the full set of fingerprints of the applicant to the Department of Law Enforcement for state and federal processing, provided the federal service is available, to be processed for any criminal justice information as defined in s. 943.045."); *see also* § 790.06(6)(d), Fla. Stat. (permitting DACS to determine eligibility based on name checks "conducted by" FDLE if legible fingerprints cannot be obtained).

The "criminal justice information" that DACS is mandated to obtain by section 790.06 of the Florida Statutes is further defined as "information on individuals *collected or disseminated* as a result of arrest, detention, or the initiation of a criminal proceeding *by criminal justice agencies*" (emphasis added), which includes FDLE but not DACS. § 943.045(12), Fla. Stat. (defining criminal justice information); § 943.045(11), Fla. Stat. (including FDLE and not DACS in the definition of a criminal justice agency). This criminal justice history includes disposition of the charges. § 943.045(5), Fla. Stat. "Disposition" is defined to include whether a person has been pardoned, paroled, or granted clemency. § 943.045(14), Fla. Stat.

DACS has no authority to ignore or to modify an applicant's background check information received from FDLE pursuant to statute. *See* § 790.06(15), Fla. Stat. (limiting DACS authority to that specified by statute). The Legislature created and mandated *this* method of collecting information and processing applications, and no other. For these reasons, DACS literally had no jurisdiction or authority to adjudicate the issues Appellant could have raised before DACS (*if* he had asserted *any* specific legal arguments, which he did not). DACS therefore properly denied his request for a formal administrative hearing under section 120.57(1), Florida Statutes.

The majority's expansion of the statutorily-authorized process violates a principle of statutory construction that we typically respect: "*expressio unius est exclusio alterius*," meaning that the

expression of one thing is the exclusion of any other. As we have described this principle, "[I]f a statute enumerates the things on which it is to operate, or forbids certain things, it is ordinarily construed as excluding from its operation all those matters not expressly mentioned. . . . And, as more particularly applicable to the statute now under consideration, a legislative direction as to *how* a thing shall be done is, in effect, a prohibition against its being done in any other way." *Sun Coast Int'l Inc. v. Dep't of Bus. Regul., Div. of Fla. Land Sales, Condos. & Mobile Homes*, 596 So. 2d 1118, 1121 (Fla. 1st DCA 1992) (citing *Alsop v. Pierce,* 19 So. 2d 799, 805–06 (Fla. 1944) (en banc)).

The statute itself expressly directs that DACS cannot do what the majority directs it to do, because the Legislature *expressly limited* DACS's authority to that set forth in the statute:

> The Legislature does not delegate to the Department of Agriculture and Consumer Services the authority to regulate or restrict the issuing of licenses provided for in this section, *beyond those provisions contained in this section*.

§ 790.06(15), Fla. Stat. (emphasis added). This could not be any clearer.

This express statutory restriction on DACS's authority is consistent with the general principle of Florida administrative law that no state agency possesses any authority that the Legislature has not expressly conferred on it. *See* § 120.52(8), Fla. Stat. (defining an "invalid exercise of delegated legislative authority" as "action that goes beyond the powers, functions, and duties delegated by the Legislature," and providing that "[s]tatutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting *the specific powers and duties conferred by the enabling statute*") (emphasis added).

DACS has no administrative rules for the kind of hearing the majority is requiring it to conduct, and cannot validly adopt any such rules because the Legislature has not expressly authorized any such powers and functions. *See, e.g., State v. Fla. Senior Living*

Ass'n, Inc., 295 So. 3d 904, 909 (Fla. 1st DCA 2020) (recognizing this clear statutory limit on agency action under section 120.52(8)). In contrast, the statute authorizes only FDLE to resolve such issues. § 943.056, Fla. Stat. Given this statutory authority conferred only on FDLE and not DACS, only FDLE has promulgated rules for the appeal process. *See* Fla. Admin. Code R. 11C-6.009; *see also* 28 C.F.R. § 25.10(a), (c) (directing that appeals be taken only through each state's federally designated point of contact (in Florida, FDLE) or directly with the FBI).

Even outside the administrative-law context, we typically adhere to the principle that we will not cross the boundary between interpreting the law and making the law. *See Fla. Police Benevolent Ass'n, Inc. v. City of Tallahassee*, 314 So. 3d 796, 803 (Fla. 1st DCA 2021) (citing United States Supreme Court and Florida Supreme Court authorities for the propositions that "[o]ur role is not to make or amend the law," and that we should "'declin[e] the invitation for the courts to overstep their bounds' and inject the court into policy making and oversight") (citations omitted). We have previously recognized we lack the power to interpret a statute in a way that would inject requirements the Legislature had not previously adopted. *See Am. Bankers Life Assurance Co. of Fla. v. Williams*, 212 So. 2d 777, 778 (Fla. 1st DCA 1968) ("This court is without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power."); *see also Halifax Hosp. Med. Ctr. v. State*, 278 So. 3d 545, 550 (Fla. 2019) (refusing to give statute "a greater effect than its provisions establish"). Without confronting these boundaries of judicial restraint, the majority improperly creates an entirely new method for DACS's processing of applications for concealed-carry licenses.

In place of the statutory process, the majority now requires DACS to *ignore* the results of the *mandatory* criminal justice review through FDLE, and instead to conduct independent evidentiary proceedings whenever an applicant with one or more prior felony convictions asserts that his or her civil rights, including gun rights, were restored. Implicitly, as the resolution of that question would leave open the broader question of whether any *other* disqualification exists (although Appellant did not

explicitly assert that he suffers from no other disqualification), the majority would require DACS to use the same court-created process to resolve that question as well.[2] In so holding, the majority has invalidated the statutorily mandated process, an act so serious that it gives rise to mandatory Florida Supreme Court appeal jurisdiction under Article V, section 3(b)(1) of the Florida Constitution. The majority has substituted its view of how the process should work in place of the Legislature's clear and unambiguous statutory process. This is improper. "The judiciary cannot extend the terms of an unambiguous statute beyond its express terms or reasonable and obvious implications under Florida's strict separation of powers delineated in article II, section three, of the Florida Constitution." *Fla. Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966, 971 (Fla. 1st DCA 2013) (en banc).

As a court within the judicial and not the legislative branch of Florida's government, we have no authority to breach the separation of powers doctrine by rewriting the statutory process. *See T-Mobile S., LLC v. City of Milton*, 728 F.3d 1274, 1284 (11th Cir. 2013) ("We are interpreting a statute, not designing one. Although we, like most judges, have enough ego to believe that we could improve a good many statutes if given the chance, statutory construction does not give us that chance if we are true to the judicial function. Our duty is to say what statutory language means, not what it should be mean, and not what it would mean if we had drafted it.").

The majority's analysis appears to be driven in large part by its opinion that the NICS database *should not* be the source of criminal justice information for Florida concealed-carry licensure, apparently either because that database is designed to regulate gun dealers' sales of firearms, or because the NICS database has a reputation for being unreliable (or both). The latter argument is

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[2] It is not clear whether the majority's analysis would extend to every basis for disqualification that an applicant seeks to challenge, such as mental health issues, domestic violence injunctions, substance-abuse issues, and so forth. *See* § 790.06(2)–(3), Fla. Stat. (listing numerous possible disqualifications).

irrelevant. Neither was preserved for our review, as the record clearly demonstrates (see Part II of this opinion).

If this issue had been preserved, clear and controlling provisions of law would resolve it easily. Section 790.06(2)(n) of the Florida Statutes conditions a Florida concealed-carry license on satisfaction of both state *and* federal requirements for *both* purchasing and possessing a gun. This reflects the Legislature's policy choice to bring regulation of gun dealers and gun sales into the analysis, and with it that process's reliance on querying NICS and several other databases for criminal justice information. *See* 28 C.F.R. § 25.6(j)(1) (establishing NICS as the source for federal, state, tribal, and local criminal justice agencies to obtain information for all firearms-related permits and licenses including concealed-carry licenses).

The controlling point is that FDLE's role in this process derives from carefully interrelated state and federal law that we are powerless to ignore, change, or circumvent. In Florida, FDLE is the sole agency statutorily authorized to receive background check information for DACS's processing of concealed-carry-license applications. § 790.06(6)(a), Fla. Stat. (designating FDLE to conduct the check). Only FDLE may make this inquiry. *Id.*; *see also* 28 C.F.R. § 25.6(d) (2020) (providing that inquiry must be initiated by the designated state agency point of contact (POC)). As the sole federally-authorized Florida POC, FDLE receives criminal background check information from the FBI's NICS database. *See* 28 C.F.R. § 25.2 ("NICS Index means the database, to be managed by the FBI, containing information provided by Federal and state agencies about persons prohibited under Federal law from receiving or possessing a firearm.").

The majority also errs by asserting that section 790.06(6)(c)3., Florida Statutes, requiring DACS to await final disposition information, somehow authorizes DACS to conduct ad-hoc evidentiary hearings without resort or reference to criminal justice information provided by FDLE from NICS and other databases. This subsection provides as follows:

> In the event the department receives criminal history information with no final disposition on a crime which may disqualify the applicant, the time limitation

> prescribed by this paragraph may be suspended until receipt of the final disposition or proof of restoration of civil and firearm rights.

§ 790.06(6)(c)3., Fla. Stat. This language does not on its face authorize DACS to conduct its own evidentiary hearings to establish final disposition or restoration-of-rights information. To the contrary, taken in context as it must be, it is limited to criminal history information, a defined term used consistently throughout this and related statutes to refer to official criminal history information obtained by FDLE from NICS and other databases under state and federal law. *See* § 943.045(5), Fla. Stat. (defining criminal history information). Further, this subsection expressly requires that this be information that DACS "receives" pursuant to express statutory authority—not "creates" from unofficial sources without statutory authority. More broadly, the majority's reasoning runs afoul of the general principle that DACS has only such specific authority as the Legislature has expressly given it. § 790.06(15), Fla. Stat. (limiting DACS's authority to that expressly conferred by statute); § 120.52(8), Fla. Stat. (limiting agencies such as DACS to the "*specific powers and duties conferred by the enabling statute*") (emphasis added). If, within the statutory framework and the limits on agency authority, an applicant fails to qualify for any of the reasons listed in subsections 790.06(2) or (3), DACS "shall" deny the concealed-carry license. § 790.06(6)(c)2., Fla. Stat.

Individuals wishing to challenge criminal justice background search results have a designated point of entry and process to do so. *See* 28 C.F.R. § 25.10(c) (permitting individuals to challenge the accuracy of NICS information by resolving the issue with "the denying agency, i.e., either the FBI or the POC [FDLE]"); *see* § 790.065(6), Fla. Stat. ("Any person who is denied the right to receive or purchase a firearm as a result of the procedures established by this section may request a criminal history records review and correction in accordance with the rules promulgated by the Department of Law Enforcement."); § 943.056, Fla. Stat. (providing detailed procedures for contesting criminal background information with FDLE); *see also* Fla. Admin. Code R. 11C-8.001 (governing reviewing and challenging background check information with FDLE); 28 C.F.R. § 25.10(a) (providing that only

the state agency point of contact (in Florida, FDLE) or the FBI itself can receive requests for more information about the reasons for denials); 28 C.F.R. § 25.10(c) (requiring that appeals challenging reasons for denials must be brought before the FBI or designated state agency points of contact (i.e., FDLE)).

Because the Florida Legislature directed DACS to obtain criminal justice information from FDLE, the designated point of contact with the federal NICS database, that direction is deemed to have contemplated and encompassed the relevant governing federal law and regulations. The Legislature's choice of process codified in the governing statute complies with interrelated federal code and regulation requirements, and provides a clear and adequate point of entry for applicants to challenge the results of FDLE's reported criminal-justice information by appealing to FDLE or directly with the FBI. More to the point, no court is authorized to ignore, circumvent, or alter the legislatively prescribed process, and particularly not in the absence of *any* legal argument preserved by the applicant below. Anyone wishing to change the process on policy grounds must address such an argument to the Legislature, not to DACS or a court.

As Judge Makar illustrates in his opinion, the majority's circumvention and expansion of Florida's statutory process raises practical issues. DACS is authorized to receive and rely *solely* on the criminal justice information report from FDLE. DACS is not authorized to receive any information from FDLE beyond the existence of the felony conviction.[3] If DACS is required to ignore the FDLE report that Appellant is disqualified pursuant to

[3] The record nevertheless inexplicably contains a printout of the NICS report on Appellant, which his counsel apparently received from FDLE. Regardless, DACS has no statutory authority to resolve disputes about the completeness or accuracy of FDLE's report. That is one reason why I respectfully disagree with the majority's and Judge Makar's conclusion that we should remand for a new hearing. Under the governing laws, none of the issues raised is justiciable before DACS. In addition, as I discuss in Part II, because Appellant failed to preserve the arguments on which the majority bases its reversal, he is not entitled to a second attempt.

information gleaned from NICS (i.e., an unspecified felony conviction), it becomes impossible to prove that the specific felony conviction Appellant acknowledges is his only felony, or the one that triggered the background-search result. DACS can never know that the particular conviction the applicant chooses to address actually eliminates all potential grounds for disqualification. The existing statutory process, on the other hand, which requires an applicant to appeal to FDLE or directly to the FBI, is valid, consistent with other state and federal law and regulations, and no more burdensome than the majority's novel creation of an evidentiary appeal through DACS, which entirely lacks statutory authority.[4]

An additional practical problem arises from the essential and massive task of compiling, maintaining, updating, and correcting relevant background information on anyone and everyone who might apply for a Florida concealed-carry license. An applicant may come to Florida from anywhere in the country (or the world), and may have lived in any number of other places along the way. Regulation of dealers and purchases applies in this context because the Legislature has conditioned issuance of these licenses on satisfactory proof that an applicant is authorized to *purchase* as well as to possess a gun under both state and federal law. § 790.06(2)(n), Fla. Stat. ("Is not prohibited from purchasing or possessing a firearm by any other provision of Florida or federal law."); *see also* § 790.065(2)(a)1., Fla. Stat. Applicants must also be determined to be free of any other statutory disqualification, only one of which is a clean criminal history free of felony convictions.

Yet the State has no repository of all-person, all-jurisdiction, all-time criminal justice information. The Legislature has not authorized, funded, or staffed DACS to create and maintain such a comprehensive database and then use it in place of the mandatory criminal justice information search through FDLE.

[4] On the record presented, where Appellant's counsel admitted at the hearing below that he had availed himself of the appeal remedy before FDLE and was unsuccessful for reasons he did not disclose, this appeal appears to be moot in any event.

(Nor does the Legislature need to do so, given its authorization of an existing process using existing federal databases.) If DACS is to ignore the background-check process the Legislature has created, it otherwise has no access to information from other jurisdictions. If we are to abandon the statutory process, and its reliance on FDLE and its access to nationwide criminal justice information, we have no adequate substitute. The majority orders DACS to simply conduct ad-hoc evidentiary hearings without that criminal justice information as defined by statute, leaving it to a hearing officer to believe or not believe an applicant's assertions in a vacuum devoid of official criminal justice history. The Legislature alone, not this Court, has authority to make and codify such policy decisions about getting a Florida concealed-carry license.

Further, since DACS is not a federally-authorized point of contact for the existing nationwide FBI databases, it has no way of providing information upstream to those databases if it determines that applicants' gun rights have been or should be restored. And, even if it did send that information to those database providers, which are not authorized to receive or recognize information from DACS, that would only create a question of fact and a conflict between state and federal information as to which is correct—and the statutes require any such questions of fact to be resolved by appeal to FDLE or the FBI. These and other practical problems illustrate why both federal and Florida law have adopted a detailed and carefully-coordinated system of providing criminal justice information to state agencies and authorized individuals in this complex and highly sensitive regulated area. If we abandon and expand this system as the majority has done, we are selecting and implementing public-policy decisions that belong to the Legislature alone. Appellant failed to preserve even a single legal argument to the contrary by raising no legal arguments below. The existing Florida statutory scheme is valid, consistent with federal law, and well within the Legislature's prerogative. We should not be altering it.

II. Lack of Preservation.

This case raises interesting and important issues about preservation, because the very short record clearly reflects that

Appellant did not preserve *any* legal arguments below, let alone the arguments on which the majority relies to reverse.[5] This section sets forth governing principles of preservation, legal authorities illustrating why preservation matters as a restraint on judicial authority, and how the record demonstrates that Appellant failed to preserve the legal arguments on which the majority nevertheless relies to reverse the judgment on appeal.

A. Preservation Principles.

The Florida Supreme Court has stated that "[i]n order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985). By my count, we have cited and relied upon this proposition from *Tillman* twenty-four times, most frequently in criminal appeals, and in the civil context as well. *See, e.g., Haim v. State*, No. 19-2094, 2021 WL 1711090, at *3 (Fla. 1st DCA Apr. 30, 2021) (refusing to address on appeal argument that criminal defendant never presented to the trial court); *Bd. of Trs. of Jacksonville Police & Fire Fund v. Kicklighter*, 122 So. 3d 510, 511 (Fla. 1st DCA 2013) (holding likewise as to argument not presented to trial court); *LaCoste v. LaCoste*, 58 So. 3d 404, 405 (Fla. 1st DCA 2011) (holding former wife waived argument that her interest in land was a non-marital asset, where she failed to so assert before the trial court).

We are usually sticklers for preservation. *See Rosier v. State*, 276 So. 3d 403, 406–07 (Fla. 1st DCA 2019) (en banc) (emphasizing repeatedly the necessity that parties preserve specific issues and arguments as a prerequisite to our addressing them). As we did in

[5] The record, filed in the Court's public docket on November 13, 2019, is only 118 pages long; and of that, 66 pages are repeated copies of the same materials about Appellant's known felony from Illinois, leaving only 52 pages of the record reflecting procedural events in this case. The telephonic hearing was only 23 minutes long, and the transcript, docketed March 2, 2021, is only 27 pages long.

Rosier, we consistently make it clear that counsel must preserve any issue bearing on disposition, or it is waived. *See Heart of Live Oak, Inc. v. State, Office of Fin. Regul.*, 196 So. 3d 1290, 1290–91 (Fla. 1st DCA 2016) (noting it is "well-established" that an issue must be raised in the appropriate administrative proceeding to be preserved for appeal); *see also Coleman v. State*, 46 Fla. L. Weekly D865, 2021 WL 1398843, at *2 (Fla. 1st DCA Apr. 14, 2021) (refusing to address criminal defendant's argument that trial court's findings as to child-victim hearsay were legally insufficient, because that specific argument was not preserved although defendant did argue unreliability of the victims' statements and general hearsay objections).

Other courts adhere to the same principles of judicial restraint following lack of preservation below. *See, e.g.*, *Deparvine v. State*, 995 So. 2d 351, 379 (Fla. 2008) (holding, in capital appeal, that argument unpreserved in the trial court is "procedurally barred on appeal"); *Jones v. U.S. Bank Trust, N.A. as Tr. for LSF9 Master Participation Trust*, 292 So. 3d 459, 462 (Fla. 2d DCA 2020) (refusing, in civil litigation context, to "address a novel legal issue that was never raised or ruled upon in the trial court," because to do so would violate principles of judicial restraint).[6] The majority's decision thus conflicts with numerous preservation cases from

[6] The only two clear exceptions to the preservation requirement, neither of which applies here, are *Anders* appeals under *Anders v. California*, 386 U.S. 738, 744–45 (1967) (requiring courts to review record in search of potential reversible errors); and fundamental error. *See Cox v. State,* 966 So. 2d 337, 347 (Fla. 2007) ("[A] claim of error that is not preserved by an objection during trial is procedurally barred on appeal unless it constitutes fundamental error."); *see also* § 924.051(3), Fla. Stat. ("An appeal may not be taken from a judgment or order of a trial court unless a prejudicial error is alleged and is properly preserved or, if not properly preserved, would constitute fundamental error."). Fundamental error exists only rarely. *See Smith v. State*, 521 So. 2d 106, 108 (Fla. 1988) (warning that "[t]he doctrine of fundamental error should be applied only in rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application").

other district courts, in addition to our own and Florida Supreme Court precedent.

Although the "tipsy-coachman" doctrine allows us to affirm a trial court judgment that is "right for the wrong reason," there is no such thing as a tipsy-coachman reversal (or not a valid one, anyway, since I am writing in response to just such a thing). *See Advanced Chiropractic & Rehab. Ctr. Corp. v. United Auto. Ins. Co.*, 103 So. 3d 866, 869 (Fla. 4th DCA 2012) ("The tipsy coachman doctrine does not permit a reviewing court to reverse on an unpreserved and unargued basis."). "As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal." *Sunset Harbor Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (citing *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999) (stating "a claim not raised in the trial court will not be considered on appeal)). The majority offers no valid explanation for why we are departing from these principles in this particular case.

B. The Corollary to Preservation: Judicial Restraint.

In *Rosier*, we quoted, applied, and emphasized the principle of judicial restraint that preservation requirements protect: we "'will not "depart from [our] dispassionate role and become an advocate by second guessing counsel and advancing for him theories and defenses which counsel either intentionally or unintentionally has chosen not to mention."' 276 So. 3d at 406 (quoting *Polyglycoat Corp. v. Hirsch Distribs., Inc.*, 442 So. 2d 958, 960 (Fla. 4th DCA 1983) (on denial of rehearing)) (internal quotations omitted); *see also D.H. v. Adept Cmty. Servs.*, 271 So. 3d 870, 888–89 (Fla. 2018) (Canady, C.J., dissenting; joined by Lawson, J.) ("This requirement of specific argument and briefing is one of the most important concepts of the appellate process. Indeed, it is not the role of the appellate court to act as standby counsel for the parties.") (citing *Polyglycoat*, 442 So. 2d at 960); *B.T. v. Dep't of Child. & Fams.*, 300 So. 3d 1273, 1279 (Fla. 1st DCA 2020) (quoting *Polyglycoat*); *MacNeil v. Crestview Hosp. Corp.*, 292 So. 3d 840, 845 (Fla. 1st DCA 2020) (Jay, J., concurring) ("With limited exceptions, our

decisions are confined 'to the issues raised' . . . . If we bend this rule, we 'undermine an important rule of judicial restraint.'").

In *Rosier*, we cited then-Judge Lawson's eloquent explanation of the link between preservation and judicial restraint principles. 276 So. 3d at 406. Here is what he said:

> Judicial restraint, in this context, refers to the principle that a court's power of judicial review should only be used where the law demands it, and never as a means of simply substituting the values or judgment of the individual judges deciding a case for the values or judgment of the elected representatives of the people. *See Black's Law Dictionary* 924 (9th ed. 2009) (defining judicial restraint as, *inter alia,* "[a] philosophy of judicial decision-making whereby judges avoid indulging their personal beliefs about the public good and instead try merely to interpret the law as legislated and according to precedent"). Judicial restraint serves as the essential self-imposed "check" against the judicial branch's abuse of power; and, "'[o]nly by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.'" *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973) (*quoting Carmichael v. S. Coal & Coke Co.,* 301 U.S. 495, 510, 57 S.Ct. 868, 81 L.Ed. 1245 (1937)). My overriding concern with the majority's resolution of this case, and the most basic reason why I cannot join in their decision, is my belief that the majority opinion violates several well-defined principles of judicial restraint.

T.M.H. v. D.M.T., 79 So. 3d 787, 826–27 (Fla. 5th DCA 2011) (Lawson, J., dissenting), *aff'd in part, disapproved in part,* 129 So. 3d 320 (Fla. 2013).

My concern here is precisely that articulated in then-Judge Lawson's final sentence: "I cannot join in their decision, [because it] is my belief that the majority opinion violates several well-defined principles of judicial restraint." We must remain a "neutral tribunal." *Manatee Cnty. Sch. Bd. v. NationsRent, Inc.*, 989 So. 2d 23, 25 (Fla. 2d DCA 2008). Because Appellant preserved no specific

legal arguments below, we should simply affirm for lack of preservation. *See PDK Lab'ys Inc. v. U.S.D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment) (concluding that where there "is a sufficient ground for deciding this case, . . . the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels us to go no further."). In light of the novel process the majority creates, its invalidation of a statutory process, and the serious issues this implicates in the context of a failure of preservation, I would sua sponte stay the majority's decision pending Florida Supreme Court review.

C. Failure of Preservation in This Case.

Despite these clearly valid and governing authorities, the majority opinion far exceeds the legal arguments that Appellant preserved below—which were exactly none. This is a civil, administrative case, with expert private lawyers representing Appellant. Appellant filed a two-page petition for formal hearing that did not include the contents prescribed by Florida Administrative Code Rule 28-106.201(2). Instead, Appellant's petition stated that he "disputes the alleged material fact that he fails to qualify for the issuance of a Florida Concealed Weapon or Firearm License and/or that he is prohibited under federal law from possessing a firearm." He attached unauthenticated copies of documents from the State of Illinois. But whether he was "qualified" or "prohibited" was the ultimate legal issue, not a question of fact, as DACS explained to Appellant. To the extent that questions of fact would inform the legal conclusion, the Florida statute gave DACS no adjudicative authority over those facts as discussed in Part I above, so in addition to failing to comply with the rule mandating specific contents for the petition, Appellant failed to assert any question of fact that could be resolved in an administrative hearing before DACS.

DACS dismissed Appellant's first petition, and provided him the list of required contents for a petition for formal hearing, along with a list of six specific, detailed contents Appellant had failed to include. DACS gave Appellant the chance to amend his petition. In round two, Appellant filed a date-stamped copy of exactly the same petition and attachments he originally filed, word-for-word,

with no additions or changes. He admits in his initial brief that he simply re-filed the original petition and attachments.

In response to Appellant's re-filing of his original petition without the corrections required by rule, DACS sent Appellant an order referring the petition to informal hearing. This order recited the procedural history and advised that Appellant had failed to identify a disputed issue of material fact for formal hearing. DACS had already provided Appellant the information and forms to correct his criminal record through FDLE or the FBI, and delayed the informal administrative hearing to allow time for that process to play out.

The transcript of the twenty-three-minute informal hearing reflects that Appellant did not attend the hearing, and that Appellant's counsel attended by phone (pre-COVID). Although the majority criticizes DACS for not sending a representative to the hearing and submitting "nothing," DACS had no duty to do otherwise. It was Appellant's burden as the petitioner to come forward with evidence and legal argument to make his case. The hearing officer even reminded counsel at the beginning of the hearing that "[t]he purpose of this hearing is to give you the opportunity to present any legal or factual arguments that you believe are relevant to the Division's [DACS's] final decision in this matter."

Despite this clear point of entry and express invitation, Appellant's counsel did not file any memorandum of law presenting legal arguments and authorities about DACS's jurisdiction or Appellant's disqualification. Nor did counsel present any oral argument about any such issues at the hearing. He simply disputed that the information DACS had received supported the legal conclusion that Appellant was disqualified. The hearing officer—correctly—advised that qualification or disqualification was a legal conclusion, not a question of fact, and not a legal argument. Counsel admitted that Appellant had pursued an appeal with FDLE, but said that FDLE had denied Appellant's appeal. Counsel did not elaborate on why, nor authenticate or introduce into evidence any documentary support for these claims (and thus the majority errs in saying Appellant

"provided proof"). Appellant did not attend, so obviously counsel did not introduce Appellant's testimony.

Although the hearing officer gave Appellant's counsel repeated opportunities to identify a legal issue justiciable before DACS and present legal argument, counsel just said, over and over again, his argument was that "he's [Appellant's] not disqualified." Counsel simply disputed that DACS had received any information that Appellant was disqualified, and summarized the unauthenticated Illinois documents that were submitted with the petition. Appellant's counsel raised no other legal issues or arguments at the hearing and did not authenticate or admit any documents into evidence. He did not make any proffer. He filed a legally insufficient petition, refused to correct it, presented no proof or legal argument, and then dumped it in the agency's lap. *See Lynn v. City of Fort Lauderdale*, 81 So. 2d 511, 513 (Fla. 1955) (observing it is "elementary" that an appellant cannot simply "dump[] the matter into the [tribunal's] lap" for decision). Appellant's *counsel* is the one who did *nothing*.

DACS gave Appellant multiple opportunities to assert any factual issue—within DACS's statutory jurisdiction—warranting an evidentiary hearing. DACS gave Appellant a very clear point of entry to resolve his argument that no legal obstacle barred him from obtaining his Florida concealed carry license. DACS complied with valid, governing law at every step. Yet Appellant did not preserve below any legal argument such as those the majority now adopts as its grounds to reverse.

Appellant's failure of preservation before the agency carried forward into his initial brief. He argued—for the first time, since he presented no legal arguments to DACS—that FDLE's report to DACS based on the NICS inquiry was not admissible evidence, that DACS was not authorized to delegate its responsibilities to FDLE, and that there was no legal authority to require applicants to appeal through either FDLE or the FBI. Because Appellant had not raised *any* of those legal arguments before DACS, he failed to preserve them as a valid basis for our disposition. *See Tillman*, 471 So. 2d at 35 (holding preservation does not exist without asserting

the "specific legal argument or ground to be argued" before the lower tribunal).

This is the disconnect between the majority opinion and Florida preservation jurisprudence: the majority fails to recognize that a party cannot raise its legal arguments for the first time on appeal; and by extension, an appellate court cannot reverse on the basis of such unpreserved arguments. *Id.*; *see also, e.g.*, *Brown v. State*, 304 So. 3d 243, 264 n.8 (Fla. 2020) (noting that specific evidentiary argument, although a variation on a general argument raised below, "is not preserved because [appellant] raised it for the first time in her initial brief") (citing *Thompson v. State*, 759 So. 2d 650, 667 n.12 (Fla. 2000)); *Finney v. State*, 660 So. 2d 674, 683 (Fla. 1995) ("Because the specific claim raised here was never raised to the trial court, the claim is not preserved for appeal.").

The majority fails to articulate how Appellant preserved any specific legal argument at all, on this record and within the scope of binding precedent finding no preservation where *specific legal arguments* raised on appeal were not first presented to the lower tribunal. The majority mentions that a Second-Amendment right is involved, which is certainly true, but which does not eliminate preservation requirements. Judge B.L. Thomas's concurring opinion, heavily emphasizing the Second-Amendment issues underlying the case, says all issues addressed were preserved because Appellant requested a hearing. But that does nothing to overcome the express legal requirement that *counsel,* not this Court after the fact on appeal, articulate specific legal arguments before the lower tribunal to preserve them for appellate review. *See Tillman*, 471 So. 2d at 35.

The record shows that *no* specific legal arguments were preserved. Appellant filed a legally insufficient petition for an evidentiary hearing without asserting any issue that was statutorily justiciable before DACS. He failed to amend when given the chance. He failed to present any evidence or assert any legal argument *at all* at the hearing. To address any issue on the merits, we are required to guess at what counsel might have argued, if he had argued anything. It is a long legal leap from a legally insufficient and unelaborated request for a hearing to a full-blown appellate opinion reversing on unpreserved legal theories. We

have no way at all to be sure that the legal reasoning the majority employs is what Appellant's counsel had in mind or would have asserted. Nor do we have any right to supply counsel's omission.

Because *no* legal arguments were preserved below despite ample opportunity, Appellant is not entitled to a new hearing. "[A]ppellate courts do not generally provide parties with an opportunity to retry their case upon a failure of proof." *Morton's of Chi., Inc. v. Lira*, 48 So. 3d 76, 80 (Fla. 1st DCA 2010); *see also, e.g., Correa v. U.S. Bank N.A.*, 118 So. 3d 952, 956 (Fla. 2d DCA 2013) (collecting cases holding that litigant is not entitled to a second bite at the apple after failing to make its case below); *In re Forfeiture of 1987 Chevrolet Corvette, Convertible, Identification No. 1G1YY3189H5116774, Tag DAI-53B*, 571 So. 2d 594, 596 (Fla. 2d DCA 1990) (holding that where counsel appeared at hearing without client, relied solely on a request for judicial notice of a previous criminal trial, and presented no other evidence, litigant "should not be given a second bite at the apple by way of a new hearing").

But perhaps a court is free to reverse based on unpreserved legal arguments if the court orders supplemental briefing on those arguments. This is the view expressed by former Third District Judge Cope: that once a court orders supplemental briefing, this creates an exception to the rule of waiver from failure of preservation, and the court is then free to rule on the basis of unpreserved arguments. *See R & B Holding Co., Inc. v. Christopher Advert. Grp., Inc.*, 994 So. 2d 329, 336–37 (Fla. 3d DCA 2008) (Cope, J., concurring in part and dissenting in part) ("It appears that an appellate court has the power to order supplemental briefing and to consider the briefs when filed. This amounts to an exception to the waiver rule cited earlier."); *see also Davis v. State*, 309 So. 3d 318, 321–22 (Fla. 1st DCA 2021) (Makar, J., concurring in denial of motion to file amended brief) ("All this said, the discretion of an intermediate appellate court in a direct criminal appeal is not unlimited and must necessarily accommodate a significant degree of deference to the matters the appellate lawyers present for our resolution, subject to *Anders* review and correction of fundamental errors. . . . In other words, the type of error to be corrected via an amended initial brief after a decision is issued must be closely akin to a fundamental error for

which the 'interests of justice' under Rule 9.040(d) would be best served.").

Some Florida Supreme Court opinions appear to take an even broader stance, claiming the high court has the right to conduct its own plenary review of any issues, preserved or not, passed-upon or not. *See Monroe v. State*, 191 So. 3d 395, 402 n.4 (Fla. 2016) ("Once we properly possess jurisdiction, we may consider any other error before us.") (citing *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.,* 654 So. 2d 911, 912 (Fla. 1995)); *see also Lawrence v. Fla. E. Coast Ry. Co.*, 346 So. 2d 1012, 1014 n.2 (Fla. 1977) ("We deem it our prerogative to consider any error in the record once we have it *properly* before us for our review.") (emphasis added).

Other decisions, including our own as I have cited above, adhere to preservation requirements, even when ordering supplemental briefing—limiting the scope of supplemental briefing to issues preserved at the trial level, or seeking argument on newly-released authorities. *See, e.g.*, *Thompson v. State*, 208 So. 3d 49, 51 n.3 (Fla. 2016) (allowing supplemental briefing to address new United States Supreme Court decision); *Fla. Carry*, 133 So. 3d at 969–70 (allowing supplemental briefing to develop issue raised before the lower tribunal).

In this case, we published an order on February 22, 2021, advising the parties that the Court had decided to hear this case en banc. We then requested supplemental briefing by published order rendered March 1, 2021. Our supplemental-briefing order directed the parties to brief three specific legal issues, as follows:

> To assist the en banc Court in its analysis, each of the parties shall file *one* supplemental brief addressing the following issues in light of the record facts and relevant provisions of state and federal law:
>
> > May the Florida Department of Agriculture and Consumer Services (DACS) rely on a National Instant Criminal Background Check System (NICS) query result to determine whether an applicant is qualified for a Florida concealed carry license? Is DACS required to

> make an independent determination, and authorized to conduct an evidentiary hearing in doing so, to resolve a disputed finding of an applicant's ineligibility; or may it rely on the availability of the Firearm Ineligibility Appeal process administered by the Florida Department of Law Enforcement (FDLE)? Does the FDLE appeal process apply to both concealed carry licenses and firearm purchases?

As it turns out, the first two of these Court questions are the legal theories on which the majority bases its reversal. But Appellant did not assert any of these legal arguments (nor any others) before DACS. We have no right to assert them for the first time ourselves.

I have found focus orders and supplemental briefing very useful in appropriate cases. Being better informed and having the benefit of targeted analysis can improve our review and opinions. But does our supplemental briefing order overcome a failure of preservation as Judge Cope proposed it does? I think it cannot, in light of the judicial-restraint ramifications if we rule on the basis of unpreserved arguments, especially if we use unpreserved arguments to *reverse* a judgment on appeal. To *reverse* a lower tribunal on the basis of entirely unpreserved arguments, with or without supplemental briefing, is surely the very polar opposite of judicial restraint in the exercise of our significant judicial power.

III. Conclusion.

On the merits, I diverge from the majority primarily because of my different view of the scope of DACS's delegated legislative authority. Procedurally, Appellant failed to preserve the issues the majority decides are dispositive. We lack authority to reverse on unpreserved legal arguments, and to do so implicates serious judicial-restraint concerns. We should affirm DACS's order.

ON MOTION FOR ATTORNEY'S FEES

Because Appellee's action "was a gross abuse of the agency's discretion," section 120.595(5), Florida Statutes, Appellant's motion for attorney's fees filed February 10, 2020, is granted. The Department of Agriculture and Consumer Services is directed to forward the attorney's fee matter to the Division of Administrative Hearings for further proceedings should the parties be unable to agree on an appropriate fee. *See Residential Plaza at Blue Lagoon, Inc. v. Agency for Health Care Admin.*, 891 So. 2d 604, 607 (Fla. 1st DCA 2005).

RAY, C.J., and LEWIS, B.L. THOMAS, ROBERTS, ROWE, OSTERHAUS, WINOKUR, JAY, M.K. THOMAS, NORDBY, TANENBAUM, and LONG, JJ., concur.

KELSEY, J., dissents with opinion in which MAKAR and BILBREY, JJ., join.

KELSEY, J., dissenting.

I dissent from the Court's order granting Appellant's barebones two-page motion for fees and costs, which asserts two meritless grounds for relief. The entirety of Appellant's motion is set forth in the Appendix.

First, Appellant cites to section 57.111, Florida Statutes (2019), the operative part of which provides as follows:

> Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing *small business party* in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 *initiated by a state agency*, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

§ 57.111(4)(a), Fla. Stat. (emphasis added). This section does not apply here, however, because these proceedings were neither "initiated by a state agency" nor is Appellant—a natural person—

a "small business party," as defined in section 57.111(3)(d) (including within this definition sole proprietors of certain small businesses, small partnerships and corporations, and certain individuals against whom an agency professional or business license). *See Q.H. v. Sunshine State Health Plan, Inc.*, 305 So. 3d 543, 546 (Fla. 4th DCA 2020) (on motion for appellate attorney's fees) (holding that child who challenged agency's denial of insurance coverage was not within the scope of section 57.111(4)(a)).

Appellant also cites, and the majority relies upon, section 120.595, Florida Statutes, but it likewise does not apply. It provides, in pertinent part, as follows:

> When there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that *the agency action which precipitated the appeal was a gross abuse of the agency's discretion*.

§ 120.595(5), Fla. Stat. (emphasis added). As applied here, the statute requires the Court to find that the "agency action" taken by DACS was a "gross abuse" of its discretion in order to award fees.

But no "gross abuse" of discretion can be shown on the basis of the sparse and conclusory motion that Appellant filed. The motion merely cites two statutes and makes conclusory boilerplate assertions. It says that DACS grossly abused its discretion, but fails to establish facts demonstrating anything close to a "gross abuse of discretion." It claims that DACS deprived Appellant of his "enumerated fundamental constitutional right that preexists the creation of the country and its Constitution," and did so "without due process and with the use of *secret evidence* and *kangaroo hearings* where no meaningful challenge to the agency action is possible." (Emphasis added.) But the motion provides no

explanation or substantiation for these outlandish allegations.[*] Moreover, Appellant presents no legal argument and cites not a single case or precedent. In short, Appellant made no attempt to satisfy the substantive statutory prerequisites for an award of fees and costs, thereby falling far short of the standard the Legislature has set by statute.

A "gross abuse of discretion" under section 120.595(5) occurs only where there was "no justification for the position" taken by the agency, such that the "appeal should have never ensued." *Residential Plaza At Blue Lagoon, Inc. v. Agency for Health Care Admin.*, 891 So. 2d 604, 607 (Fla. 1st DCA 2005). Alternatively, the statute is satisfied if the agency's action was "so contrary to the fundamental principles of administrative law that it constituted a gross abuse of discretion." *Pro Tech Monitoring, Inc. v. State, Dep't of Corr.*, 72 So. 3d 277, 281 n.22 (Fla. 1st DCA 2011); *see also Q.H.*, 305 So. 3d at 545 (citing these authorities). Neither test is satisfied here. The "agency action" in this case is no different from what the Department has done *for decades* in assessing applications of former felons seeking a concealed weapons license with not a single protestation in thousands of cases—until now. It simply cannot be a "gross abuse" of discretion to use a reasonable and lawful procedure for decades to process applications for concealed firearms licenses simply because a

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[*] Appellate courts typically impose sanctions for such statements in court proceedings, but here they are rewarded. *See, e.g., West v. State*, 283 So. 3d 1289, 1290 (Fla. 1st DCA 2019) (upholding contempt against defendant who said "if you're going to have a kangaroo court, go ahead on and have it."); *Martin v. State*, 711 So. 2d 1173, 1174–75 (Fla. 4th DCA 1998) ("Plainly Martin's comments are criminally contemptuous on their face and require no explanation by the judge as to why they are deemed contemptuous."); *see generally* Parker B. Potter, Jr., *Dropping the K-Bomb: A Compendium of Kangaroo Tales from American Judicial Opinions*, 11 SUFFOLK J. TRIAL & APP. ADVOC. 9 (2006) ("Litigants and even attorneys have found any number of creative and colorful ways to announce their displeasure by dropping the K-bomb outside of court, in pleadings, and in open court, directly to the face of an alleged marsupial decision-maker. Rarely has this proven to be a winning litigation strategy.").

majority of an appellate court decides that a more formal hearing is necessary.

In *Q.H.*, an insured child challenged an insurer's denial of coverage, and prevailed on the merits. *See id.* at 545. The Fourth District started with placing the burden on the party claiming fees to show a gross abuse of discretion. *Id.* Here, Appellant has not "shown" anything in his motion for fees and costs, just as he did nothing before DACS on the merits.

Turning to the merits of the alleged "gross abuse of discretion," the court in *Q.H.* court noted that the case involved "difficult legal issues concerning the interaction between the benefits authorized under a federal statute and the agency's prior authorization criteria." *Id.* So too here, the proper analysis would depend upon a complex and interrelated set of both state and federal laws and regulations, with no prior judicial decision on point. Just as in *Q.H.,* "[i]t cannot be said that there was 'no justification' for the agency's position or that it was contrary to fundamental principles of agency law." *Id.* Just as the agency's action in *Q.H.* did not constitute a "gross abuse of discretion," neither did DACS's action here.

In contrast to *Q.H.* and this case, in *Residential Plaza* the agency's action was "patently" and "completely" contrary to existing statutory provisions directly on point. 891 So. 2d at 606. We also noted in *Residential Plaza* that the agency did not even respond to the substantive arguments raised on appeal. *Id.* at 607. Neither factor exists here. Similarly in *Pro Tech*, we noted that the agency's dismissal of a formal bid protest as untimely, although it had been hand-delivered to the agency's guard and timely date-stamped, was contrary to existing law. 72 So. 3d at 278–79. The difference between these and similar cases on the one hand, and this case on the other, is that the majority's novel interpretation of the governing statutes is just that: brand new, not pre-existing, and doubtless a complete surprise to DACS. To impose fees and costs retroactively against an agency for acts that pre-dated the majority's new pronouncement of law is a gross deprivation of due process. *See Fla. Patient's Comp. Fund v. Scherer*, 558 So. 2d 411, 414 (Fla. 1990) (vacating award of attorney's fees on due process

grounds where the law enlarging liability for fees was not enacted until after the actions allegedly giving rise to liability for fees).

As we have observed recently in denying fees against another agency, "'an agency generally must follow its own precedents.'" *Kendall Healthcare Group, Ltd. v. Public Health Trust of Miami-Dade Cnty.*, 296 So. 3d 533, 536 (Fla. 1st DCA 2020) (quoting *Flagship Manor, LLC v. Fla. Hous. Fin. Corp.*, 199 So. 3d 1090, 1094 (Fla. 1st DCA 2016)). DACS has always followed the same interpretation and application of the pertinent concealed-carry-license statutes and rules that the majority addresses on the merits. No court has *ever* invalidated DACS's interpretation of the law. Yet the majority opinion announces—for the first time in the decades-old statutory licensing process—that DACS is now required to utilize a new procedure not previously authorized. DACS reasonably relied on existing state and federal law and practice as guiding its actions, within the scope of its delegated legislative authority. FDLE, which also plays a very significant part in the licensing process by mandate of both state and federal law, agreed entirely with DACS's interpretation and application of that law. To follow a reasonable and long-existing interpretation of law in the face of no contrary authority is not a "gross abuse of discretion."

Finally, the imposition of fees in this case is not only unjustified, but also may have a substantial fiscal impact on the functioning of the licensing system itself due to past and pipeline cases that the Court's fee order is likely to affect.

We should summarily deny Appellant's motion for fees and costs.

Appendix

APPELLANT'S MOTION FOR ATTORNEYS' FEES AND COSTS

Appellant moves for an award of attorney's fees and costs pursuant to Sec. 57.111 and 120.595, Fla. Stat., and as grounds therefore states:

1. The actions of the agency here are a gross abuse of discretion because this is a case where the agency has exercised discretion contrary to the law and despite a clear prohibition on the agency exercising any discretion under the provisions of Secs. 790.06, and 790.33, Fla. Stat.

2. Appellant has retained counsel who have spent significant time and resources due to the agency's illegal and unauthorized delegation of its duty and authority to another agency.

3. The actions of the agency along with its brief and the related cases currently before this court demonstrate that the agency has created processes and procedures that result in delays in the exercise of constitutional and statutory rights.

4. The adverse actions by the agency have interfered and adversely affected the most substantial interest a challenger to agency action can have, the exercise of an enumerated fundamental constitutional right that preexists the creation of the country and its Constitution.

5. Appellee's actions, policies and procedures have resulted in the deprivation of Appellant's rights without due process and with the use of secret evidence and kangaroo hearings where no meaningful challenge to the agency action is possible.

6. The agency has ignored material issues of fact raised by Appellant to deny any adversarial hearing where the evidence and law could be fully vetted.

WHEREFORE, for the foregoing reasons Appellant requests this Court award all attorneys' fees and costs reasonably incurred in this cause.

Eric J. Friday of Kingry & Friday, Jacksonville; Noel Howard Sohn Flasterstein of Noel H. Flasterstein, P.A., Hollywood, for Appellant.

Steven Hall, General Counsel; and Tobey Schultz, Senior Attorney, Tallahassee, for Appellee Department of Agriculture and Consumer Services.

James Martin, General Counsel; and D. Jason Harrison, Assistant General Counsel, Tallahassee, for Florida Department of Law Enforcement.