

## C

Supreme Court of Virginia.

Rudolph **DIGIACINTO**

v.

The RECTOR AND VISITORS OF GEORGE MA-  
SON UNIVERSITY.

Record No. 091934.

Jan. 13, 2011.

**Background:** Campus visitor filed complaint seeking declaratory judgment and injunctive relief against state university, claiming that regulation prohibiting possession of firearms on campus violated his constitutional right to carry a firearm. University filed a demurrer and plea of sovereign immunity in response to complaint. The Circuit Court, Fairfax County, [Michael P. McWeeny](#), J., dismissed complaint with prejudice and ordered the regulation be sustained. Visitor appealed.

**Holdings:** The Supreme Court, [S. Bernard Goodwyn](#), J., held that:

- (1) as a matter of first impression, protection of the right to bear arms expressed in the state constitution was co-extensive with rights provided by the Second Amendment of federal constitution;
- (2) the regulation did not violate visitor's right to bear arms under state and federal constitutions; and
- (3) university's promulgation of regulation did not violate uniform government provision contained in state constitution.

Affirmed.

West Headnotes

### [1] Appeal and Error 30 ↪893(1)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(1) k. In general. [Most Cited](#)

[Cases](#)

Arguments challenging the constitutionality of a statute or regulation are questions of law that the Court of Appeals reviews de novo on appeal.

### [2] Weapons 406 ↪107(2)

406 Weapons

406I In General

406k102 Constitutional, Statutory, and Regulatory Provisions

406k107 Construction

406k107(2) k. Right to bear arms in general. [Most Cited Cases](#)

Protection of the right to bear arms expressed in the Virginia Constitution was co-extensive with the rights provided by the Second Amendment, concerning campus visitor's right to possess firearms on campus of state university; Virginia General Assembly incorporated specific language of Second Amendment—"the right of the people to keep and bear arms shall not be infringed"—into the existing framework of right to bear arms provision in Virginia Constitution and, as a result, the language in Virginia Constitution concerning right to bear arms was substantially identical to the rights founded in Second Amendment. [U.S.C.A. Const.Amend. 2](#); [West's V.C.A. Const. Art. 1, § 13](#).

### [3] Weapons 406 ↪106(3)

406 Weapons

406I In General

406k102 Constitutional, Statutory, and Regulatory Provisions

406k106 Validity

406k106(3) k. Violation of right to bear arms. [Most Cited Cases](#)

Regulation prohibiting possession of firearms in state university's facilities or at university events did not violate campus visitor's right to bear arms under state and federal constitutions; university

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constituted a sensitive place, having 30,000 students enrolled, 50,000 elementary and high school students attending summer camps, and 130 children attending preschool, and regulation was tailored, restricting weapons only in those places where people congregated and were most vulnerable. [U.S.C.A. Const.Amend. 2](#); [West's V.C.A. Const. Art. 1, § 13](#); [8 VAC 35-60-20](#).

### [4] States 360 ↪ 191.4(1)

360 States

360VI Actions

360k191 Liability and Consent of State to Be Sued in General

360k191.4 Necessity of Consent

360k191.4(1) k. In general. [Most Cited](#)

Cases

Principle of “sovereign immunity” means that a sovereign State cannot be sued in its own courts without its consent and permission.

### [5] States 360 ↪ 191.9(1)

360 States

360VI Actions

360k191 Liability and Consent of State to Be Sued in General

360k191.9 Particular Actions

360k191.9(1) k. In general. [Most Cited](#)

Cases

As a general rule, the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain governmental action or to compel such action.

### [6] States 360 ↪ 191.9(2)

360 States

360VI Actions

360k191 Liability and Consent of State to Be Sued in General

360k191.9 Particular Actions

360k191.9(2) k. Declaratory judgment.

[Most Cited Cases](#)

State university's plea of sovereign immunity

did not bar campus visitor's claim for declaratory and injunctive relief to challenge university's promulgation of regulation prohibiting possession of firearms on campus as violative of uniform government provision contained in state constitution because uniform government provision was self-executing and did not require further legislation to make it operative; uniform government provision was within state constitution bill of rights, and was stated in the negative, prohibiting any government “separate from, or independent of, the government of Virginia.” [West's V.C.A. Const. Art. 1, § 14](#); [8 VAC 35-60-20](#).

### [7] States 360 ↪ 191.9(2)

360 States

360VI Actions

360k191 Liability and Consent of State to Be Sued in General

360k191.9 Particular Actions

360k191.9(2) k. Declaratory judgment.

[Most Cited Cases](#)

Sovereign immunity does not preclude declaratory and injunctive relief claims based on self-executing provisions of the state constitution or claims based on federal law.

### [8] States 360 ↪ 1

360 States

360I Political Status and Relations

360I(A) In General

360k1 k. Nature, status, and sovereignty in general. [Most Cited Cases](#)

### Weapons 406 ↪ 104

406 Weapons

406I In General

406k102 Constitutional, Statutory, and Regulatory Provisions

406k104 k. Power to regulate. [Most Cited Cases](#)

State university's promulgation of regulation prohibiting possession of firearms on campus did

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not violate uniform government provision contained in state constitution stating that “no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof”; university was not attempting to function as a separate government, but had statutory authority to make regulations concerning itself. [West's V.C.A. Const. Art. 1, § 14](#); [8 VAC 35-60-20](#).

**\*\*366 Rudolph DiGiacinto**, pro se.

**\*\*367 E. Duncan Getchell, Jr.**, State Solicitor General ([Kenneth T. Cuccinelli II](#), Attorney General; [Charles E. James, Jr.](#), Chief Deputy Attorney General; [Wesley G. Russell, Jr.](#), Deputy Attorney General; [Stephen R. McCullough](#), Senior Appellate Counsel; [David G. Drummey](#), Assistant Attorney General, on brief), for appellees.

National Rifle Association of America ([Robert Dowlut](#); [Lindsay K. Charles](#), on brief), in support of appellant, amicus curiae.

Present: [HASSELL](#), C.J., [KOONTZ](#), [KINSER](#), [LEMONS](#), [GOODWYN](#), and [MILLETTE](#), JJ., and [LACY](#), S.J.

OPINION BY Justice [S. BERNARD GOODWYN](#).

**\*130** In this appeal, we consider whether [8 VAC § 35-60-20](#), a George Mason University regulation governing the possession of weapons on its campus, violates the Constitution of Virginia or the United States Constitution.

#### I. Background

Rudolph **DiGiacinto** filed a complaint seeking declaratory judgment and injunctive relief against the Rector and Visitors of George Mason University (collectively GMU) in the Circuit Court of Fairfax County. **DiGiacinto** petitioned the circuit court to enjoin GMU from enforcing [8 VAC § 35-60-20](#) against him. The regulation provides as follows:

Possession or carrying of any weapon by any person, except a police officer, is prohibited on university property in academic buildings, administrative office buildings, student residence buildings, dining facilities, or while attending sporting, **\*131** entertainment or educational events. Entry upon the aforementioned university property in violation of this prohibition is expressly forbidden.

[8 VAC § 35-60-20](#). **DiGiacinto** is not a student or employee of GMU, but he visits and utilizes the university's resources, including its libraries. He desires to exercise his right to carry a firearm not only onto the GMU campus but also into the buildings and at the events enumerated in [8 VAC § 35-60-20](#). **DiGiacinto** argued in his complaint that [8 VAC § 35-60-20](#) violates his constitutional right to carry a firearm, that GMU lacks statutory authority to regulate firearms, and that the regulation conflicts with state law.

GMU filed a demurrer and plea of sovereign immunity in response to **DiGiacinto's** complaint. GMU contended that while **DiGiacinto** could properly pursue constitutional claims to openly carry a firearm on campus, sovereign immunity barred all claims based on Virginia's concealed firearms statute, [Code § 18.2-308](#), and claims challenging GMU's regulatory authority. The circuit court granted the plea of sovereign immunity regarding the statutory concealed firearms claims, but ruled that **DiGiacinto** could proceed on the open carry of firearms claims. The parties stipulated to the facts asserted in their trial briefs and, after hearing the legal arguments, the circuit court took the matter under advisement.

The circuit court held that sovereign immunity barred a declaratory judgment proceeding concerning the scope of GMU's regulatory authority, but even if sovereign immunity did not bar such a claim, GMU had the requisite authority to adopt [8 VAC § 35-60-20](#). The circuit court also held that [8 VAC § 35-60-20](#) was constitutional under both the Constitution of Virginia and the United States Con-

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stitution. The circuit court referred to *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), and the facts, as stipulated by the parties, in explaining its decision:

*Heller* does not define what constitutes a sensitive place, but the Supreme Court lists as examples schools, [and] government buildings, “[p]resumably because possessing firearms in such places risks harm to great numbers of defenseless people; that is, children,” [and] the buildings are important to government functioning.

\*132 George Mason University notes there are 5,000 employees and 30,000 students enrolled, ranging from age 16 to even senior citizen age. Three-hundred fifty-two in the incoming Freshman class will be under the age of 18 beginning this semester. Approximately 50,000 elementary and high school students attend summer camps at the University. They use these academic \*\*368 buildings, which are part of the regulation. There is also a child development center in which approximately 130 student/employee children are enrolled [in the] preschool and ... both the libraries and the Johnson Center ... are regularly frequented by children ages two to five years old.

High school graduations, athletic games, concerts and circus performances are just a few of the family activities occurring on campus. The individuals who are part of this large community of interests clearly are the type of individuals whose safety concerns on a public university campus constitute a compelling State interest. The buildings and activities described in the regulations are those wherein the individuals gather: therefore, [they] are sensitive places as contemplated by [*Heller*]....

I find the regulation is constitutional.

The circuit court dismissed **DiGiacinto's** complaint with prejudice and ordered that GMU's regulation be sustained. **DiGiacinto** appeals.

## II. Analysis

**DiGiacinto** argues that the circuit court erred in holding that GMU's regulation does not violate [Article I, § 13 of the Constitution of Virginia](#) and the Second and Fourteenth Amendments of the United States Constitution. He also contends that the circuit court erred in sustaining GMU's plea of sovereign immunity because [Article I, § 14 of the Constitution of Virginia](#) is a self-executing constitutional provision, and GMU did not have the authority to promulgate [8 VAC § 35-60-20](#).

**DiGiacinto's** argument that [8 VAC § 35-60-20](#) violates [Article I, § 13 of the Constitution of Virginia](#) and the Second and Fourteenth Amendments of the United States Constitution relies upon a primarily historical analysis. Describing [8 VAC § 35-60-20](#) as “effectually a total ban” on the right to bear arms on GMU's campus, **DiGiacinto** \*133 argues that the regulation is not narrowly tailored and violates the historic understanding of the right to bear arms.

GMU responds that the right to keep and bear arms is not an absolute right. It contends that, as recognized in *Heller*, the Second Amendment does not prevent the government from prohibiting firearms in sensitive places, which includes GMU's university buildings and widely attended university events. GMU further argues that [8 VAC § 35-60-20](#) is narrowly tailored because it allows individuals to lawfully carry firearms on the open grounds of GMU's campus.

[1] Arguments challenging the constitutionality of a statute or regulation are questions of law that this Court reviews de novo on appeal. See *Shivae v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005). The Second Amendment of the United States Constitution provides, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” [U.S. Const. amend. II](#).

Like the United States Constitution, the Consti-

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tution of Virginia also protects the right to bear arms. It states:

That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed; that standing armies, in time of peace, should be avoided as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.

Va. Const. art. I, § 13. The interpretation of Article I, § 13 of the Constitution of Virginia is an issue of first impression. Whereas **DiGiacinto** contends that Article I, § 13 contains greater protections than afforded by the Second Amendment of the United States Constitution, GMU argues that, as relevant to this matter, the rights are co-extensive. We agree with GMU.

As noted by Professor Howard, the Virginia General Assembly incorporated the specific language of the Second Amendment—"the right of the people to keep and bear arms shall not be infringed"—into the existing framework of Article I, § 13 of the Constitution of Virginia. 1 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 273 (1974). As a result, the language in **\*369 \*134 Article I, § 13** concerning the right to bear arms is "substantially identical to the rights founded in the Second Amendment." *Id.* at 274.

[2] This Court has stated that provisions of the Constitution of Virginia that are substantively similar to those in the United States Constitution will be afforded the same meaning. *See, e.g., Shivaee*, 270 Va. at 119, 613 S.E.2d at 574 ("due process protections afforded under the Constitution of Virginia are co-extensive with those of the federal constitution"); *Habel v. Industrial Development Authority*, 241 Va. 96, 100, 400 S.E.2d 516, 518 (1991) (federal construction of the Establishment Clause in the First Amendment "helpful and persuasive" in construing the analogous state constitu-

tional provision). We hold that the protection of the right to bear arms expressed in Article I, § 13 of the Constitution of Virginia is co-extensive with the rights provided by the Second Amendment of the United States Constitution, concerning all issues in the instant case. Thus, for the purposes of this opinion, we analyze **DiGiacinto's** state constitutional rights and his federal constitutional rights concurrently.

The Supreme Court of the United States has held that the Second Amendment protects the right to carry and possess handguns in the home for self-defense. *Heller*, 554 U.S. at 634-37, 128 S.Ct. at 2821-22; *see also McDonald v. City of Chicago*, 561 U.S. ----, ----, 130 S.Ct. 3020, 3050, 177 L.Ed.2d 894 (2010) (plurality opinion), 3059 (Thomas, J., concurring). Individual self-defense is "the central component of the right itself." *Heller*, 554 U.S. at 599, 128 S.Ct. at 2801. In *McDonald*, the Court further held that the Second Amendment applies to the states by way of the Fourteenth Amendment, 561 U.S. at ----, 130 S.Ct. at 3050 (plurality opinion), or the Privileges and Immunities Clause, *id.* at 3059 (Thomas, J., concurring).

The Supreme Court clearly stated in *Heller*, and a plurality of the Court reiterated in *McDonald*, that the right to carry a firearm is not unlimited. In *Heller*, the Supreme Court specifically recognized that

nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

**\*135** *Heller*, 554 U.S. at 625-28, 128 S.Ct. at 2816-17. The Supreme Court further explained its assertion by noting, "[w]e identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 627, 128 S.Ct. at 2817 n. 26.

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The Supreme Court stated in *McDonald*:

It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as “prohibitions on the possession of firearms by felons and the mentally ill,” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” We repeat those assurances here.

561 U.S. at ----, 130 S.Ct. at 3047 (plurality opinion) (internal citations omitted) (quoting *Heller*, 554 U.S. at 625-28, 128 S.Ct. at 2816-17).

Neither *Heller* nor *McDonald* casts doubt on laws or regulations restricting the carrying of firearms in sensitive places, such as schools and government buildings. Indeed, such restrictions are presumptively legal. *Heller*, 554 U.S. at 626-28, 128 S.Ct. at 2817 n. 26. In the instant case, GMU is a public educational institution and an agency of the Commonwealth. *George Mason University v. Floyd*, 275 Va. 32, 37, 654 S.E.2d 556, 558 (2008); see also Code § 23-14 (classifying GMU as an educational institution, public body and “governmental instrumentalit[y] for the dissemination of education”). The Commonwealth owns GMU's real estate and personal property. Code § 23-91.25.

**\*\*370** It was stipulated at trial that GMU has 30,000 students enrolled ranging from age 16 to senior citizens, and that over 350 members of the incoming freshman class would be under the age of 18. Also approximately 50,000 elementary and high school students attend summer camps at GMU and approximately 130 children attend the child study center preschool there. All of these individuals use **\*136** GMU's buildings and attend events on cam-

pus. The fact that GMU is a school and that its buildings are owned by the government indicates that GMU is a “sensitive place.”

Further, the statutory structure establishing GMU is indicative of the General Assembly's recognition that it is a sensitive place, and it is also consistent with the traditional understanding of a university. Unlike a public street or park, a university traditionally has not been open to the general public, “but instead is an institute of higher learning that is devoted to its mission of public education.” *ACLU v. Mote*, 423 F.3d 438, 444 (4th Cir.2005). Moreover, parents who send their children to a university have a reasonable expectation that the university will maintain a campus free of foreseeable harm. See *Schieszler v. Ferrum College*, 236 F.Supp.2d 602, 606-10 (W.D.Va.2002); *Hartman v. Bethany College*, 778 F.Supp. 286, 291 (N.D.W.Va.1991).

Recognizing the sensitivity of the university environment, the General Assembly established “a corporate body composed of the board of visitors of George Mason University” for the purpose of entrusting to that board the power to direct GMU's affairs. Code §§ 23-91.24, -91.29. Although the real estate and personal property comprising GMU is property of the Commonwealth, the General Assembly has provided that this property “shall be transferred to and be known and taken as standing in the name and under the control of the rector and visitors of George Mason University.” Code § 23-91.25. Among the board of visitors' powers is to control and expend the university funds. Code § 23-91.29(a). The board of visitors is also tasked with safeguarding the university's property and the people who use it by making “all needful rules and regulations concerning the University.” *Id.* Such necessary rules and regulations include policies that promote safety on GMU's campus.

[3] GMU promulgated 8 VAC § 35-60-20 to restrict the possession or carrying of weapons in its facilities or at university events by individuals other than police officers. The regulation does not impose

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a total ban of weapons on campus. Rather, the regulation is tailored, restricting weapons only in those places where people congregate and are most vulnerable—inside campus buildings and at campus events. Individuals may still carry or possess weapons on the open grounds of GMU, and in other places on campus not enumerated in the regulation. We hold that GMU is a sensitive place and that 8 VAC § 35-60-20 is constitutional and does not violate \*137 Article I, § 13 of the Constitution of Virginia or the Second Amendment of the federal Constitution.

**DiGiacinto** also argues that the circuit court erred in sustaining GMU's plea of sovereign immunity regarding his claim that GMU did not have authority to promulgate 8 VAC § 35-60-20 and that the regulation is inconsistent with state laws. He claims that GMU's promulgation of the regulation violates the uniform government provision contained in Article I, § 14 of the Constitution of Virginia and that Article I, § 14 is a self-executing provision of the Constitution of Virginia not subject to the defense of sovereign immunity.

[4][5] “[Sovereign immunity] is an established principle of sovereignty ... that a sovereign State cannot be sued in its own courts ... without its consent and permission.” *Gray v. Virginia Sec'y of Transp.*, 276 Va. 93, 101, 662 S.E.2d 66, 70 (2008) (citation and quotation marks omitted). “As a general rule, the Commonwealth is immune both from actions at law for damages and from suits in equity to restrain governmental action or to compel such action.... Sovereign immunity may also bar a declaratory judgment proceeding against the Commonwealth,” *Afzall v. Commonwealth*, 273 Va. 226, 231, 639 S.E.2d 279, 282 (2007) (citations \*\*371 and quotation marks omitted), and does so for merely statutory claims.<sup>FNI</sup>

**FNI.** As an agency of the Commonwealth, GMU is entitled to the protection of sovereign immunity afforded to the state. See *Rector & Visitors of the Univ. of Va. v. Carter*, 267 Va. 242, 245, 591 S.E.2d 76,

78 (2004); *James v. Jane*, 221 Va. 43, 51, 282 S.E.2d 864, 868 (1980).

[6][7] However, sovereign immunity does not preclude declaratory and injunctive relief claims based on self-executing provisions of the Constitution of Virginia or claims based on federal law. *Gray*, 276 Va. at 104-07, 662 S.E.2d at 71-73; see *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 317 & n. 15, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997) (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting). Thus, a plea of sovereign immunity cannot bar a claim by **DiGiacinto** for declaratory and injunctive relief, challenging GMU's authority to promulgate the regulation, based upon a self-executing provision of the Constitution of Virginia. GMU claims that Article I, § 14 is not a self-executing provision of the Constitution of Virginia. We disagree.

Article I, § 14 provides, “That the people have a right to uniform government; and, therefore, that no government separate from, or independent of, the government of Virginia, ought to be erected or established within the limits thereof.” This Court has articulated the following characteristics of a self-executing provision:

\*138 A constitutional provision is self-executing when it expressly so declares. See, e.g., Va. Const. art. I, § 8. Even without benefit of such a declaration, constitutional provisions in bills of rights and those merely declaratory of common law are usually considered self-executing. The same is true of provisions which specifically prohibit particular conduct. Provisions of a Constitution of a negative character are generally, if not universally, construed to be self-executing.

.....

A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be en-

forced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.

*Gray*, 276 Va. at 103-04, 662 S.E.2d at 71-72 (internal quotation marks omitted) (quoting *Robb v. Shockoe Slip Found.*, 228 Va. 678, 681-82, 324 S.E.2d 674, 676 (1985)). Moreover, “[i]f a constitutional provision is self-executing, no further legislation is required to make it operative.” *Id.* at 103, 662 S.E.2d at 71 (citations omitted).

Article I, § 14 is within the Bill of Rights of the Constitution of Virginia. Further, the second portion of Article I, § 14 is stated in the negative, prohibiting any government “separate from, or independent of, the government of Virginia.” This prohibition does not require further legislation to make it operative. Therefore, under the test articulated in *Gray*, we hold that Article I, § 14 is self-executing and therefore GMU does not have sovereign immunity as to claims arising under that provision. FN2

FN2. However, GMU's sovereign immunity has not been waived to the extent that **DiGiacinto's** declaratory judgment proceeding is premised on statutory and non-constitutional claims, and **DiGiacinto** has not challenged the propriety of the dismissal of all such claims by the circuit court, based upon GMU's plea of sovereign immunity.

[8] Despite our conclusion that Article I, § 14 is self-executing, in order for **DiGiacinto** to prove a violation of that constitutional provision, he must establish that GMU, in promulgating 8 VAC § 35-60-20, functioned as a separate or independent government. The history of Article I, § 14 indicates that its origin related to the boundary problems that the Commonwealth faced during its inception: \*139 “Virginians were concerned that some of the land companies might attempt to create a new state within the boundaries of Virginia in order to enhance

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their chances of successfully defending claims to vast amounts of unsettled and sparsely settled land.” 1 A.E. Dick Howard, *Commentaries on the Constitution of Virginia* 279 (1974). In the instant case, the argument that GMU, in promulgating 8 VAC § 35-60-20, was attempting to function as a separate government\*\*372 is without merit. GMU had statutory authority under Code § 23-91.29 to make regulations concerning the university. Therefore, GMU did not violate Article I, § 14.

Lastly, **DiGiacinto** argues that the General Assembly cannot acquiesce or delegate its powers away to GMU. Code § 23-91.24 makes clear that GMU is “subject at all times to the control of the General Assembly.” The General Assembly did not improperly give or delegate its powers to GMU. Therefore, we hold that this argument likewise lacks merit.

### III. Conclusion

Accordingly, for the reasons stated, we will affirm the circuit court's judgment.

*Affirmed.*

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