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IN THE  
**SUPREME COURT OF VIRGINIA**

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RECORD NO. 091934  
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RUDOLPH DIGIACINTO,

*Appellant,*

v.

THE RECTOR AND VISITORS  
OF GEORGE MASON UNIVERSITY,

*Appellee.*

—  
REPLY BRIEF OF APPELLANT  
—

Rudolph DiGiacinto

*Pro se Appellant*

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## **INTRODUCTION**

Both Mr. DiGiacinto and The Rector and Visitors of George Mason University (GMU) agree that there is no substantive case law on the meaning of Va. Const. Art. I § 13 by this Court. Mr. DiGiacinto at (J.A. 26-27) and GMU at (J.A. 49) have argued in the trial court that strict scrutiny is at least the floor for the standard of review for a fundamental right in Virginia.

Assuming this court decides that sovereign immunity has been waived by Va. Const. Art I, § 14, GMU has no authority to pass a regulation that deprives Mr. DiGiacinto of a right granted by the General Assembly as a license is good throughout the Commonwealth and Va. Code § 18.2-308(O) is not at issue because Regulation 8VAC35-60-20 does not have the force of law and can only be unlawfully enforced under a trespass.

## **ARGUMENT**

### **I. THE CONSTITUTION IS SUPREME OVER LEGISLATIVE ENACTMENTS.**

Even absent the Virginia Declaration of Rights of 1776, the Ancient Charter Rights of 1606, 1609, and 1611 of the Virginia Company of London enumerated to Virginians a pre-existing individual right and duty to keep

and to bear arms. *Luther v. Borden*, 48 U.S. (7 How.) 1, 48 (1849) (“The people of Rhode Island had continued to live under their charter of 1663 from Charles the Second till 1841.”). GMU in its brief before this Court resurrects the Jeffersonian principle that legislative enactments determine what is constitutional and that these acts somehow show that the “sensitive place” dicta criteria from *District of Columbia v. Heller*, 128 S. Ct., 2783, 2816-17 (2008) exists in Virginia law by the violation of the Constitution through the repeated acts of the legislature. (Brief of Appellee 9-11). As Jefferson wrote:

It [The Virginia Constitution] pretends no higher authority than other ordinances of the same session; it does not say, that it shall be perpetual; that it shall be unalterable by other legislatures; that it shall be transcendent above the powers of those, who they knew would have equal power with themselves. Not only the silence of the instrument is a proof they thought it would be alterable, but [by] their own practice also...passed acts of assembly in contradiction to their ordinance of government; and every assembly from that time to this time has done the same. I am safe therefore in the position, that the constitution itself is alterable by the ordinary legislature. Thomas Jefferson, *Notes on the State of Virginia*, *The Portable Thomas Jefferson*, 167 (Merrill D. Peterson ed. 1975).

This Court soundly rejected that Jeffersonian principle. “\*A constitution is that which the powers of government are limited... \*[footnote] That the word constitution in the title of the instrument under consideration, is not synonymous with ordinance or law, (as seems to be the opinion of

the able author of "Notes on Virginia,") but is used in the former sense, is evident from its being called "the constitution, or form of government, &c..." *Kemper v Hawkins*, 3 Va. (1 Va. Cases) 20, 24-27 (1793). "A Constitution is in fact, and must be regarded by the judges as a fundamental law...the constitution ought to be preferred to the statutes; the intention of the people to the intention of their agents." *Id.* at 83.

The legislature has been able to transgress the constitutional limitations placed upon them precisely because of the vacuum of case law on Va. Const. Art. I § 13. The post American Civil War Virginia legislature maliciously made the Virginia militia an all volunteer force and then made it illegal to carry a firearm on Sunday that eventually became Va. Code § 18.2-283.

If any person carry any gun, pistol, bowie-knife, dagger, or other dangerous weapon, to a place of worship while a meeting for religious purposes is being held at such place, or, without good and sufficient cause therefor, carry any such weapon on a Sunday at any place other than his own premises... *Code of Virginia*: Title 52., Chap. 185 § 3806, 902 (Richmond 1887).

The great body of historical evidence prior to the Virginia Declaration of Rights however shows that the militia trained at churches on Sunday with their personal arms. (J.A. 132-133). "All men that are fittinge to beare armes, shall bring their peices to church...It is ordered and appoynted, That

the commanders of all the severall plantations, doe upon holy days exercise the men under his command” (1631). Va. Stat. at Large, 1 Hening 174 (1823); “It is enacted and confirmed that masters of every family shall bring with them to church on Sondays one fixed and serviceable gun with sufficient powder and shott vpon penalty of ten pound of tobacco” (1642). Va. Stat. at Large, 1 Hening 263 (1823); “And further, it shall and may be lawful for the lieutenant or other chief officer of the militia in the county, to order all soldiers inlisted therein to go armed to their respective parish churches.” *An Act for the better regulating and disciplining the Militia*, (1757) Va. Stat. at Large, 7 Hening 96 (1823); “Every soldier ordered to go armed to church neglecting so to do shall pay five shillings for every such failure”, *Id.* at 98; *Cf. An ordinance for raising and embodying a sufficient force, for the defense and protection of this colony*, (1775) Va. Stat. at Large, 9 Hening 29-30 (1823).

Colonel George Mason as a vestryman of Pohick Church in Fairfax County and a member of the Virginia Committee of Safety (J.A. 121) which passed the 1775 Ordinance *supra*, was quite aware that churches were not “sensitive places” when he penned the Virginia Declaration of Rights § 13 (1776). As the U.S. Supreme Court just noted in *United States v. Comstock* \_\_ S.Ct. \_\_, 2010 WL 1946729 (2010) citing *Walz v. Tax Comm’n of City of*

*New York*, 397 U. S. 664, 678 (1970)(“[N]o one acquires a vested or protected right in violation of the Constitution by long use ...”). “[w]hen a question is made as to the constitutionality of a law, it is not to be decided by repeated acts of the legislature on which no question has been raised or adjudged, but by the bill of rights and the constitution” *Goddin v. Crump*, 35 Va. (8 Leigh) 120, 153 (1837).

GMU is not a “sensitive place” and that term has no current legal basis under the history of Va. Const. Art. I § 13. Contrary to the assertion or inadvertant wording in GMU’s brief before this Court (Brief of Appellee at 3), Mr. DiGiacinto has consistently denied that GMU is a sensitive place and that term is born from dicta. (J.A. 30, 191). The only question before the *Heller* court was whether the District of Columbia’s handgun ban violated the U.S. Const. Amend. II. for those who possessed a handgun in the home. The court answered that handgun possession in the home was a fundamental individual right. *Heller*, 128 S. Ct., 2783, at 2821-22.

The people of Virginia by affirmative vote at the ballot box added the words “ therefore, the right of the people to keep and bear arms, shall not be infringed;” in 1970. The people voted upon the vernacular plain meaning of “shall not be infringed”. *Quesinberry v. Hull*, 159 Va. 270, 274-75, 165 S.E. 382, 383 (1932)(“Constitutions are not esoteric documents and

recondite learning ought to be unnecessary when we come to interpret provisions apparently plain...The people make them, the people adopt them, the people must be supposed to read them, with the help of common-sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.”). “[t]he Constitution is supreme, taking precedence over statutory provisions in conflict therewith. What the Constitution says shall not be done, cannot be done. If the Constitution says something is not a proper governmental function, no amount of legislative language can make it so”. *Button v. Day*, 208 Va. 494, 503, 158 S.E.2d 735, 741 (1968).

Mr. DiGiacinto has the right to keep and bear arms at GMU under Va. Const. Art. I § 13 (1971). The 1971 wording added no new rights that did not exist in the Virginia Declaration of Rights § 13 (1776) (J.A. 176). Regulation 8VAC35-60-20 is unconstitutional as applied to Mr. DiGiacinto.

## **II. A LICENSE IS GOOD THROUGHOUT THE COMMONWEALTH**

In *Royall v. Virginia*, 116 U.S. 572, 581 (1886) the U.S. Supreme Court quoted this Court’s opinion in *Humphreys v. City of Norfolk*, 66 Va. (25 Gratt.) 97, 99 (1874) that a license to practice law was good throughout the Commonwealth. Consistent with this idea, two recent opinions of the Attorney General on the concealed carry of firearms under Va. Code §

18.2-308(D) have stated the following: “A person’s privilege to carry a concealed handgun is considered universal within the Commonwealth subject to limited circumstances. The General Assembly has specifically set out those places where the carrying of a concealed handgun is prohibited”. Op. Va. Att’y Gen. No. 02-074 (2002); Op. Va. Att’y Gen. No. 05-078 (2006). Cf. Op. Va. Att’y Gen. No. 08-043 (2008)(Universities are not listed).

The restriction under Va. Code § 18.2-308(O) is irrelevant as Regulation 8VAC35-60-20 does not have the force of law and is without authority as only the legislature has the power to make law. *Taylor v. Commonwealth*, 187 Va. 214, 220, 46 S.E.2d 384, 387 (1948). GMU can only unlawfully enforce the regulation against permit holders by the law of trespass under Va. Code § 18.2-119. GMU may not “forbid what the legislature has expressly licensed, authorized, or required.” *Blanton v. Amelia County*, 261 Va. 55, 64-65, 540 S.E.2d 869, 874 (2001). It would be quite an anomaly and a usurpation for the legislature to grant a license to permit an act and then have an agency that “shall be subject at all times to the control of the General Assembly” and not be able to pass regulations “inconsistent with the general laws of the Commonwealth” to thwart the will of the General Assembly. “A necessary corollary is that where a grant of

power is silent upon its mode of execution, a method of exercise clearly contrary to legislative intent, or inappropriate to the ends sought to be accomplished by the grant, also would be unreasonable.” *Arlington County v. White*, 259 Va. 708, 720, 528 S.E.2d 706, 712 (2000)(Hassell, J., dissenting with Carrico, J., and Compton, J., joining).

Regulation 8VAC35-60-20 is in conflict with the General Assembly’s express intentions through Va. Code § 18.2-308(D), Va. Code § 18.2-287.4. (“[o]r any other place of whatever nature that is open to the public... The provisions of this section shall not apply to... any person having a valid concealed handgun permit”) and Va. Code § 55-248.9(A)(6). A regulation must have statutory authority to have the force of law. *Carbaugh v. Solem*, 225 Va. 310, 314, 302 S.E.2d 33, 35 (1983). “[w]hen the legislature delegates authority to an administrative agency to promulgate regulations, those regulations must neither exceed the scope of the authority delegated nor be inconsistent with it.” *Avalon Assisted Living Facilities v. Zager*, 39 Va. App. 484, 508, 574 S.E.2d 298, 309 (2002). GMU has not been given authority to adopt Regulation 8VAC35-60-20.

Mr. DiGiacinto urges that this Court add its voice to the chorus of the courts of Utah and Colorado. *University of Utah v. Shurtleff*, 144 P.3d 1109, 1121 (Utah 2006)(The University must comply with applicable statutory law

on firearms as the University is not autonomous.); *Students for Concealed Carry on Campus, LLC. v. The Regents of the University of Colorado*, \_\_\_ P.3d \_\_\_ 2010 WL1492308 (Colo. App. April 15, 2010)(“The legislature also determined, It is necessary that the state occupy the field of regulation of the bearing of concealed handguns...The General Assembly thus enacted a broad statutory scheme directed toward creating uniform standards for carrying concealed handguns.”). Regulation 8VAC35-60-20 is invalid as applied to Mr. DiGiacinto.

### **CONCLUSION**

This Court should reverse the judgment of the Circuit Court in all respects and find that Regulation 8VAC35-60-20 is unconstitutional as applied to Mr. DiGiacinto, or in the alternative, declare that Regulation 8VAC35-60-20 is invalid as applied to Mr. DiGiacinto.

Respectfully Submitted,

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Rudolph DiGiacinto  
Appellant, *pro se*.

## **CERTIFICATE**

I hereby certify that Rule 5:26(d) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, fifteen (15) copies of this Reply Brief of Appellant have been filed with the Clerk of the Supreme Court of Virginia and three (3) copies have been mailed first class postage prepaid and/or hand delivered to Mr. E. Duncan Getchell, Jr., State Solicitor General, Office of the Attorney General, 900 E. Main St., Richmond, Virginia 23219, on this 24th, day of May, 2010. I also certify that an electronic version of this Reply Brief of Appellant has been also filed this same day.