

Record No. 091934

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IN THE  
SUPREME COURT OF VIRGINIA

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RUDOLPH DIGIACINTO

*Appellant,*

v.

THE RECTOR AND VISITORS OF GEORGE MASON UNIVERSITY

*Appellee.*

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OPENING BRIEF  
OF RUDOLPH DIGIACINTO

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Rudolph DiGiacinto  
Appellant *Pro Se*

May 5, 2010

## TABLE OF CONTENTS

Table of Authorities .....	iii
Statement of the Nature of the Case and Material Proceedings .....	1
Assignments of Error.....	2
Questions Presented.....	2
Statement of Facts .....	3
Standard of Review .....	5
Argument .....	8
I.    Regulation 8VAC35-60-20 violates the Virginia Constitution Article I, § 13 and the United States Constitution Amendments II & XIV .....	8
A. Ancient Charter Rights.....	8
B. Dicta Cannot Be Cited As Authority.....	14
C. GMU is not a Sensitive Place .....	16
D. The Regulation is not Narrowly Tailored .....	24
E. Violation of the Fourteenth Amendment .....	31
II.   Va. Const. Art. I, § 14 is a self-executing constitutional provision and sovereign immunity has been waived. GMU cannot be separate from or independent of the Commonwealth. GMU does not have the delegated authority to promulgate regulation 8VAC35-60-20 or to suspend the execution of the laws by maintaining a regulation inconsistent with the general laws of the Commonwealth under Va. Code § 23-91.24 <i>et seq</i> and Va. Code § 1-248. ....	36

A. Va. Const. Art. I, § 14 is Self-executing and Waives GMU’s  
Sovereign Immunity ..... 36

B. Statutory Rights are Actionable in the Courts ..... 39

III. The General Assembly cannot acquiesce its constitutional powers  
away or acquiesce to GMU’s regulation when the General Assembly  
has explicitly stated that GMU ‘shall be subject at all times to the  
control of the General Assembly’ under Va. Code § 23-91.24..... 44

Conclusion..... 46

Certificate ..... 48

## TABLE OF AUTHORITIES

### **CASES**

<i>ACLU v. Mote</i> , 423 F.3d 438 (4 <sup>th</sup> Cir. 2005) .....	24
<i>Aldridge v. Commonwealth</i> , 4 Va. (2 Va. Cas.) 447 (1824).....	13
<i>Alford v. City of Newport News</i> , 220 Va. 584, 260 S.E.2d 241 (1979) .....	34
<i>Almond v. Day</i> , 197 Va. 782, 91 S.E.2d 660 (1956).....	35
<i>Alston v. Commonwealth</i> , 32 Va. App. 661, 529 S.E.2d 851 (2000).....	25
<i>Ames v. Town of Painter</i> , 239 Va. 343, 389 S.E.2d 702 (1990).....	43
<i>Andrews v. Board of Supervisors</i> , 200 Va. 637, 107 S.E.2d 445 (1959)....	43
<i>Assaid v. Roanoke</i> , 179 Va. 47, 18 S.E.2d 287 (1941) .....	21, 31, 43
<i>Avalon Assisted Living Facilities, Inc. v. Zager</i> , 39 Va. App. 484, 574 S.E.2d 298 (2002).....	43
<i>Ballard v. Commonwealth</i> , 228 Va. 213, 321 S.E.2d 284 (1984) .....	6, 33
<i>Blanton v. Amelia County</i> , 261 Va. 55, 540 S.E.2d 869 (2001).....	39
<i>Bliss v. Commonwealth</i> , 12 Ky. (2 Litt.) 90 (1822).....	35
<i>Board of Regents of State Colleges v. Roth</i> , 408 U.S. 564 (1972) .....	40
<i>Bouie v. City of Columbia</i> , 378 U.S. 347 (1964) .....	40
<i>Brentwood Acad. v. TN Sec. School Ath. Assn.</i> , 531 U.S 288 (2001).....	25
<i>Burroughs v. Peyton</i> , 57 Va. (16 Gratt.) 470 (1864) .....	22, 23, 28

<i>Button v. Day</i> , 208 Va. 494, 158 S.E.2d 735 (1968).....	8
<i>Chauncey Hutter, Inc. v. VEC</i> , 50 Va. App. 590, 652 S.E.2d 151 (2007)...	41
<i>City of Boerne v. Flores, Archbishop of San Antonio, et al.</i> , 521 U.S. 507 (1997).....	5
<i>City of Cleburne v. Cleburne Living Center, Inc.</i> , 473 U.S. 432 (1985).....	33, 34
<i>Cohens v. Virginia</i> , 19 U.S. (6 Wheat) 264 (1821) .....	16
<i>Cooper v. Commonwealth</i> , 54 Va. App. 558, 680 S.E.2d 361 (2009) .....	16
<i>Crenshaw v. Slate River Co.</i> , 27 Va. (6 Rand.) 245 (1828).....	30
<i>Custis v. Lane</i> , 17 Va. (3 Munf.) 579 (1813).....	14, 33
<i>Daingerfield v. Thompson</i> , 74 Va. (33 Gratt.) 136 (1880).....	15
<i>Davis v. Burke</i> , 179 U.S. 399 (1900) .....	6
<i>Dean v. Paolicelli</i> , 194 Va. 219, 72 S.E.2d 506 (1952).....	35
<i>Delaplane v. Crenshaw</i> , 56 Va. (15 Gratt.) 457 (1860) .....	42, 44
<i>District of Columbia v. Heller</i> , 128 S. Ct., 2783 (2008).....	passim
<i>Ellinger v. Commonwealth</i> , 102 Va. 100, 45 S.E. 807 (1903) .....	46
<i>George Mason University v. Floyd</i> , 275 Va. 32, 654 S.E.2d 556 (2008)....	31
<i>Giles v. Commonwealth</i> , 277 Va. 369, 672 S.E.2d 879 (2009) .....	25
<i>Girouard v. United States</i> , 328 U.S. 61 (1946) .....	26

<i>Gray v. Virginia Secretary of Transportation</i> , 276 Va. 93, 662 S.E.2d 66 (2008).....	5, 36
<i>Harman v. Forssenius</i> , 380 U.S. 528 (1965) .....	31
<i>Infants et al. v. Virginia Housing Development Authority</i> , 221 Va. 659, 272 S.E.2d 649 (1980).....	41
<i>Jones v. Commonwealth</i> , 267 Va. 218, 591 S.E.2d 72 (2004).....	24
<i>Kamper v. Hawkins</i> , 3 Va. (1 Va. Cases) 20 (1793) .....	passim
<i>Mahan v. NCPAC</i> , 227 Va. 330, 315 S.E.2d 829 (1984).....	33
<i>Mapp v. Ohio</i> , 367 U.S. 643 (1961) .....	14
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803).....	40
<i>Marsh v. Alabama</i> , 326 U.S. 501 (1946).....	25
<i>Marshall et al. v. Northern Virginia Regional Transportation Authority</i> , 275 Va. 419, 657 S.E.2d 71 (2008) .....	7, 41, 43
<i>Mayhew v. Commonwealth</i> , 20 Va. App. 484, 458 S.E.2d 305 (1995) .....	34
<i>McCabe v. Commonwealth</i> , 274 Va. 558, 650 S.E.2d 508 (2007).....	7, 34
<i>Nordlinger v. Hahn</i> , 505 U.S. 1 (1992).....	33
<i>Nordyke v. King</i> , 563 F. 3 <sup>rd</sup> 439 (9 <sup>th</sup> Cir. 2009) .....	2, 15
<i>Nunn v. State</i> , 1 Ga. 243 (1846) .....	19
<i>Ohree v. Commonwealth</i> , 26 Va. App. 299, 494 S.E.2d 484 (1998).....	31
<i>Opinion of the Justices No. 94</i> , 252 Ala. 199, 40 So.2d 330 (1949).....	6

<i>Perpich v. DOD</i> , 496 U.S. 334 (1990).....	28
<i>Peyton v. Williams</i> , 206 Va. 595, 145 S.E. 2d 147 (1965).....	45, 46
<i>Phillips v. Rector and Visitors of Univ. of Va.</i> , 97 Va. 472, 34 S.E. 66 (1899) .....	38
<i>Planned Parenthood of Southeastern Pennsylvania v. Casey</i> , 505 U.S. 833 (1992).....	13
<i>Poindexter v. Greenhow</i> , 114 U.S. 270 (1885).....	38
<i>Pruneyard Shopping Ctr. v. Robins</i> , 447 U.S. 74 (1980).....	14, 25
<i>Richmond Tenants Org. v. Richmond Redevelopment Housing Authority</i> , 751 F. Supp. 1204 (E.D. Va. 1990).....	45
<i>Royall v. Thomas</i> , 69 Va. (28 Gratt.) 130 (1877).....	15
<i>Safeway Stores v. Milk Commission</i> , 197 Va. 69, 87 S.E.2d 769 (1955) .....	44, 45
<i>San Antonio School District v. Rodriguez</i> , 411 U.S. 1 (1973).....	6
<i>Shivaee v. Commonwealth</i> , 270 Va. 112, 613 S.E.2d 570 (2005) .....	5
<i>Strawberry Hill Land Corp. v. Starbuck</i> , 124 Va. 71, 97 S.E. 362 (1918)...	23
<i>Stuart’s Ex’rs v. Board of Sinking Fund Com’rs</i> , 123 Va. 224, 96 S.E. 239 (1918).....	42
<i>Students for Concealed Carry on Campus, LLC. v. The Regents of the University of Colorado</i> , __ P.3d __ WL1492308 (Colo. App. 2010) ..	40, 43

<i>Tate v. Department of Development and Conservation</i> , 133 F.Supp. 53 (E.D. Va. 1955) .....	25
<i>Taylor v. Commonwealth</i> , 187 Va. 214, 46 S.E.2d 384 (1948) .....	21, 41
<i>Town of Madison, Inc. v. Ford</i> , 255 Va. 429, 498 S.E.2d 235 (1998).....	43
<i>United States v. Blakeney</i> , 44 Va. (3 Gratt.) 405 (1847) .....	20
<i>United States v. Schwimmer</i> , 279 U.S. 644 (1929) .....	26
<i>University of Utah v. Shurtleff</i> , 144 P.3d 1109 (Utah 2006).....	39
<i>Uzzle v. Commonwealth</i> , 107 Va. 919, 60 S.E. 52 (1908) .....	22
<i>Washington v. Glucksberg</i> , 521 U.S. 702 (1997) .....	9, 34
<i>Yick Wo v. Hopkins</i> , 118 U.S. 356 (1886).....	30, 39

## **CONSTITUTIONAL PROVISIONS**

U.S. Constitution Amend. II.....	passim
U.S. Constitution Amend. XIV .....	passim
Virginia Constitution Art. I, § 1.....	30
Virginia Constitution Art. I, § 13 .....	passim
Virginia Constitution Art. I, § 14 .....	passim
Virginia Constitution Art. I, § 15 .....	24
Virginia Constitution Art. I, § 2.....	30, 34
Virginia Constitution Art. I, § 6.....	passim
Virginia Constitution Art. I, § 7.....	passim

Virginia Constitution Art. IV, § 1 .....	passim
Virginia Constitution Art. VIII, § 9 .....	19, 24

## **STATUTES**

32 U.S.C. 109.....	28
Virginia Code § 1-248 .....	2, 36, 39
Virginia Code § 18.2-119 .....	40
Virginia Code § 18.2-280 .....	19
Virginia Code § 18.2-287.4 .....	4, 39
Virginia Code § 18.2-308 .....	4, 39
Virginia Code § 18.2-308.1 .....	19
Virginia Code § 18.2-308.2 .....	21
Virginia Code § 18.2-481 .....	38
Virginia Code § 22.1-277.07 .....	19
Virginia Code § 23-91.24 .....	passim
Virginia Code § 23-91.29 .....	39, 44
Virginia Code § 44-5 .....	28
Virginia Code § 44-6 .....	22
Virginia Code § 55-248.9 .....	39, 45
Virginia Code § 8.01-184 .....	39

## REGULATIONS

8VAC35-60-20 .....passim

## OTHER AUTHORITIES

1 <i>The Revised Code of the Laws of Virginia</i> (Richmond 1819).....	39
16 Am. Jur. 2d <i>Constitutional Law</i> § 101 (2008).....	6
16 Am. Jur. 2d <i>Constitutional Law</i> § 169 (2008).....	6
2 <i>Hale’s Pleas of the Crown</i> , 92 (London 1800).....	32
H.J.R. No. 21., House of Delegates 98 (1964)( <i>Concerning the Inherent Right of Citizens of this Commonwealth to own and bear arms</i> ).....	46
Henry St. George Tucker, 1 <i>Commentaries on the Laws of Virginia Comprising the Substance of a Course of Lectures Delivered to the Winchester Law School</i> (Winchester 1836).....	35
Military Commission of Thomas Jefferson, June 10, 1770: <a href="http://www.virginia1774.org/TJCommission.html">http://www.virginia1774.org/TJCommission.html</a> .....	11
Op. Va. Att’y Gen. No. 08-043 (Sep. 2008).....	20
St. George Tucker, <i>Blackstone’s Commentaries: With Notes and Reference, to the Constitution and laws of the Federal Government of the United States and of the Commonwealth of Virginia</i> (William W. Birch & Adam Small 1803).....	29, 31, 38

Va. Stat. at Large, Hening (1823) .....passim

## **FOUNDERS WRITINGS**

### *7 The Writings of George Washington from the Original Manuscript*

*Sources 1745 - 1799* (J. Fitzpatrick ed. 1932)..... 27

*The Papers of George Mason, 1725-1792* (Robert A. Rutland ed. 1970)

.....passim

*The Papers of Thomas Jefferson* (Julian P. Boyd ed. 1953)..... 17

## **OTHER PUBLICATIONS**

Alfred J. Morrison, *The Beginnings of Public Education in Virginia, 1776-*

*1860* (1917)..... 20

*Amicus Curiae* Brief of Virginia1774.org, *District of Columbia v. Heller*, 128

S. Ct., 2783 WL477091 (2008) .....passim

Edward D. Neill, *History of the Virginia Company of London, With Letters*

*To And From The First Colony Never Before Printed*, 339-346 (1869)... 10

Helen C. Rountree, *Pocahantas, Powhatan, Opechancanough: Three*

*Indian Lives Changed by Jamestown*, 213-214 (2005) ..... 10

Henry Mayer, *A Son of Thunder: Patrick Henry and the American Republic*

(1991)..... 36

John C. Henderson, <i>Thomas Jefferson's Views on Public Education</i> , 203 (1890).....	16
John E. Selby, <i>The Revolution in Virginia, 1775-1783</i> (1988).....	19
John S. Flory, 8 <i>Publications of the Southern History Association</i> , No. 1., <i>The University of Henrico</i> , 50 (1904).....	10
John S. Patton, <i>Jefferson, Cabell and the University of Virginia</i> , 294-295 (1906).....	18
Julian A. Chandler and Travis B. Thames, <i>Colonial Virginia</i> , 106-107, 176- 183 (1907).....	10
Kate M. Rowland, 1 <i>The Life of George Mason, 1725-1792</i> (1892).....	11, 37
Philip A. Bruce, 1 <i>Institutional History of Virginia in the Seventeenth Century</i> , 602 (1910).....	32
<i>Selected Orations of Marcus Cicero</i> (C.D. Yonge trans. 1892).....	30, 42
<i>The Jamestown Adventure: Accounts of the Virginia Colony, 1605-1614</i> , IX-X (Ed Southern ed. 2004).....	8
William W. Hening, <i>The New Virginia Justice, Comprising the Office and Authority of a Justice of the Peace</i> , 192-196 (1810).....	32

## STATEMENT OF THE NATURE OF THE CASE

Mr. DiGiacinto filed suit in Fairfax County Circuit Court requesting declaratory and injunctive relief against George Mason University's Regulation 8VAC35-60-20 to enforce his right to keep and bear arms under the Va. Const. Art. I, § 13 and the U.S. Const. Amends. II & XIV. (Joint Appendix at 1, 5-6). Mr. DiGiacinto also challenged whether George Mason University (GMU) had the authority to promulgate the regulation or to maintain it when it is inconsistent with state law (J.A. at 6-8). The trial court's **Order** of April 27, 2009 allowed the constitutional and statutory provisions relating to the Open Carry of firearms to go forward but the statutory complaints on the concealed carry of firearms was barred by sovereign immunity. A trial on the merits was held on July 22, 2009 on the remaining issues with both parties submitting Opening, Response, and Reply Briefs. The Honorable Judge Michael P. McWeeny on July 31, 2009 issued an oral opinion holding that Regulation 8VAC35-60-20 is constitutional. A **Final Order** was entered on August 14, 2009. This appeal followed.

## ASSIGNMENTS OF ERROR

- I. The trial court erred in holding that GMU's Regulation 8VAC35-60-20 is constitutional, narrowly tailored and that GMU is a sensitive place in contravention to Va. Const. Art. I, § 13, and the U.S. Const. Amends. II and XIV. *Obiter dicta* cannot be cited as authority. The case of *Nordyke v. King*, 563 F. 3<sup>rd</sup> 439, 459 (9<sup>th</sup> Cir. 2009) upon which GMU relied and the court recited, has been vacated.
  
- II. The trial court erred in sustaining the plea of sovereign immunity because Va. Const. Art. I, § 14 is a self-executing constitutional provision. GMU cannot be separate from or independent of the Commonwealth. GMU does not have the delegated authority to promulgate Regulation 8VAC35-60-20 nor to suspend the execution of the laws by maintaining a regulation inconsistent with the general laws of the Commonwealth under Va. Code § 23-91.24 *et seq* and Va. Code § 1-248.
  
- III. The trial court erred in holding that the General Assembly had acquiesced to GMU's regulation. The General Assembly cannot acquiesce its constitutional powers away under Va. Const. Art. IV, § 1; Va. Const. Art. I, §§ 6 & 7. The General Assembly cannot acquiesce to GMU's regulation when the General Assembly has explicitly stated that GMU "shall be subject at all times to the control of the General Assembly" under Va. Code § 23-91.24.

## QUESTIONS PRESENTED

- I. Whether Regulation 8VAC35-60-20 violates the Va. Const. Article I, § 13, and the U.S. Const. Amend. II and U.S. Const. Amend. XIV.? **(Assignment of Error I.)**
  
- II. Whether Va. Const. Art. I, § 14 is a self-executing constitutional provision that waives the Commonwealth's sovereign immunity and allows declaratory judgment to determine whether GMU has the delegated authority to promulgate Regulation 8VAC35-60-20 or to

maintain a regulation inconsistent with state law? (**Assignment of Error II.**)

- III. Whether the General Assembly can acquiesce its Constitutional powers away under Va. Const. Art. IV, § 1; Va. Const. Art. I, §§ 6 & 7, or acquiesce to GMU's regulation when GMU "shall be subject at all times to the control of the General Assembly" under Va. Code § 23-91.24.? (**Assignment of Error III.**)

### **STATEMENT OF FACTS**

There are no facts in dispute in this case and this case presents a pure question of law. Mr. DiGiacinto is a resident of Fairfax County, Virginia. Mr. DiGiacinto is not a student at George Mason University. Mr. DiGiacinto visits and utilizes the resources of George Mason University including but not limited to the academic libraries to facilitate continual research and documentation for the website Virginia1774.org and court cases. The *Amicus Curiae* Brief of Virginia1774.org, *District of Columbia v. Heller*, 128 S. Ct., 2783 WL477091 (2008)<sup>1</sup> contained information obtained from George Mason University. Mr. DiGiacinto attended the first national symposium on "Firearms law and the Second Amendment" held at George Mason University's Arlington Campus in 2005. Mr. DiGiacinto on a daily basis exercises his constitutional right to keep and bear arms by the

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<sup>1</sup> Also available at: [http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290\\_RespondentAmCuVirginia1774new.pdf](http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_RespondentAmCuVirginia1774new.pdf)

carrying of his handgun in places open to the public. Mr. DiGiacinto has obtained the statutory granted privilege to carry a concealed handgun under Va. Code § 18.2-308(D). Mr. DiGiacinto also at times carries in his handgun a magazine made for the firearm that holds more than 20 rounds of ammunition as defined under Va. Code § 18.2-287.4. (J.A. at 2).

The Defendant, The Rector and Visitors of George Mason University, is an educational institution, instrumentality and agency of the Commonwealth. (J.A. at 45-46). GMU originally promulgated Regulation 8VAC35-60-20 in 2007. The regulation was amended in 2008. This regulation prohibits possession of any weapons except by police officers. (J.A. at 46).

8VAC35-60-20. 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, entertainment or educational events. Entry upon the aforementioned university property in violation of this prohibition is expressly forbidden.

Mr. DiGiacinto contacted the Chief of Police of George Mason University with a letter detailing the illegalities of the regulation and asking if the regulation would be enforced against him. The Chief of Police responded to Mr. DiGiacinto on September 26, 2008 with the following message: “Thank you for your comments on our regulations at George

Mason University. The University Police Department is a full service, nationally accredited police department and is empowered to enforce the laws of the commonwealth and certain regulations of the university (including the regulation you cite). We are proud of the services we provide to the university community.” (J.A. at 4).

### **STANDARD OF REVIEW**

This Court reviews constitutional arguments and pure questions of law *de novo*. *Shivae v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005). The term “people” in the Bill of Rights refers to individuals. *District of Columbia v. Heller*, 128 S. Ct., 2783, 2790-2791 (2008). Self-executing constitutional provisions place duties as well as restrictions upon the Commonwealth and its departments and waives the Commonwealth’s sovereign immunity. *Gray v. Virginia Secretary of Transportation*, 276 Va. 93, 103-06, 662 S.E.2d 66, 71-73 (2008). “The first eight Amendments to the Constitution set forth self-executing prohibitions on governmental action, and this Court has had primary authority to interpret those prohibitions...As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing.” *City of Boerne v. Flores, Archbishop of San Antonio, et al.*, 521 U.S. 507, 524 (1997). The General Assembly or its agents may only

legislate to further enhance or to enforce a self-executing constitutional provision. 16 Am. Jur. 2d *Constitutional Law* § 101 (2008). “[n]o legislation may restrict or alter a self-executing constitutional provision” because a self-executing provision “speaks for the entire people as their supreme law”. *Davis v. Burke*, 179 U.S. 399, 403 (1900); *Opinion of the Justices No. 94.*, 252 Ala. 199, 202, 40 So.2d 330, 333 (1949).

This Court has stated that a fundamental individual right is one that is “explicitly or implicitly guaranteed by the Constitution”. *Ballard v. Commonwealth*, 228 Va. 213, 216, 321 S.E.2d 284, 286 (1984). This Court has more recently adopted the federal standard of strict judicial scrutiny for review of those rights. “Strict scrutiny means that the State’s system is not entitled to the usual presumption of validity, that the State, rather than the complainants, must carry a “heavy burden of justification.” *Ballard*, 228 Va. at 216, 321 S.E.2d at 286 (quoting *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973)). See also 16 Am. Jur. 2d *Constitutional Law* § 169 (2008)(“A law that impinges upon a fundamental right explicitly or implicitly secured by the Constitution is presumptively unconstitutional.”).

Strict scrutiny requires a compelling governmental interest and narrowly tailored legislation to sustain a challenged law or ordinance.

*McCabe v. Commonwealth*, 274 Va. 558, 562, 650 S.E.2d 508, 511 (2007).

A government interest that's compelling and narrowly tailored cannot override the prohibitions or self-executing provisions the people have placed upon the government to protect a fundamental right under the Virginia Constitution. As this Court stated, "But previous to the promulgating the plan of government, these deputies declared that certain rights were inherent in the people, which the public servants who might be entrusted with the execution of this government, were never to be permitted to infringe...having reserved many fundamental rights to the people, which were declared not to be subject to legislative control..." *Kemper v.*

*Hawkins*, 3 Va. (1 Va. Cases) 20, 47- 48 (1793). "The government of Virginia, he remarked, was drawn from the people; yet there were certain great and important rights, which the people by their bill of rights declared paramount to the power of the legislature." George Mason (June 16, 1788), in 3 *The Papers of George Mason, 1725-1792*, 1083-1085 (Robert A.

Rutland ed. 1970). "An act is unconstitutional if it is expressly prohibited or is prohibited by necessary implication based upon the provisions of the Constitution of Virginia or the United States Constitution." *Marshall et al. v.*

*Northern Virginia Regional Transportation Authority*, 275 Va. 419, 428, 657 S.E.2d 71, 75 (2008); *Button v. Day*, 208 Va. 494, 503, 158 S.E.2d 735,

741 (1968)(“What the Constitution says shall not be done, cannot be done.”).

## ARGUMENT

### **I. REGULATION 8VAC35-60-20 VIOLATES THE VIRGINIA CONSTITUTION ARTICLE I, § 13 AND THE UNITED STATES CONSTITUTION AMENDMENTS II & XIV.**

#### **A. Ancient Charter Rights**

Private adventurers styled as the Virginia Company of London manned three wooden sailing ships named Discovery, Godspeed, and the Susan Constant. They landed at Jamestown and established the first permanent English settlement in North America in 1607.<sup>2</sup> The Third Charter of the Virginia Company is especially descriptive and directed that those coming to Virginia to be heavily armed including: “armour, weapons, ordinance, munition, powder, shot...for their use and defence”.<sup>3</sup> The surrender of the Colony of Virginia back to Crown rule after the English Civil War in 1651 protected private arms by compact. *Amicus, supra* at 22-23. Despite the well documented history in Virginia of the keeping and

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<sup>2</sup> *The Jamestown Adventure: Accounts of the Virginia Colony, 1605-1614*, IX-X (Ed Southern ed. 2004).

<sup>3</sup> *A Third Charter of K. James I, to the Treasurer and Company, for Virginia* (March 12, 1611), Va. Stat. at Large, 1 Hening 105 (1823); See also First Charter of 1606, *Id.* at 62; Second Charter of 1609, *Id.* at 93.

bearing of all types of arms by full citizens at all public places, there is no known substantive case law on Va. Const. Art. I, § 13:

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. (1776, 1971)(emphasis added showing 1971 amendment).

The trial court correctly recognized that Va. Const. Art. I, § 13 is a self-executing constitutional provision waiving the Commonwealth's sovereign immunity and that the people of Virginia have always had a fundamental individual right to keep and bear arms despite the absence of the words "the right of the people to keep and bear arms shall not be infringed" in the Declaration of Rights of 1776 (J.A. at 176). The people of Virginia have also had an entwined right to a well-regulated militia, composed of the body of the people, trained to arms, as the proper, natural, and safe defense of a free state. These rights are "deeply rooted" in Virginia's history and are the concept of "ordered liberty". *Washington v. Glucksberg*, 521 U.S. 702, 719-21 (1997).

These pre-existing rights were connected and solidified by blood, death and tears. On March 22, 1622, the Colony of Virginia was almost destroyed by a treacherous attack orchestrated by the Powhatan Chief

Opechancanough that took the lives of 347 men, women and children of the Colony. “The warriors were to leave off their usual warpaint, to lull their victims and proceed to the nearest plantations under the guise of friendship...[t]hen as work was beginning...do as much killing as possible...Warriors killed anyone easily dispatched, wounded as many as others as possible, but wasted little time in attacking those who put up a serious fight.” Helen C. Rountree, *Pocahantas, Powhatan, Opechancanough: Three Indian Lives Changed by Jamestown*, 213-214 (2005). The “Citie of Henricus” and the fledgling University of Henrico were razed. George Thorpe the university superintendent and Virginia Company council member was killed. Seventeen other tenants died on the college grounds.<sup>4 5</sup> “The fury of the savages seems to have been directed especially against those settlements that were designed as educational centres.” John S. Flory, 8 *Publications of the Southern History Association*, No. 1., *The University of Henrico*, 50 (1904).

The direct response by the General Assembly to the massacre was not to disarm the people, but to enforce by law at the next Assembly session that the people were to always be armed. “That no man go or

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<sup>4</sup> Julian A. Chandler and Travis B. Thames, *Colonial Virginia*, 106-107, 176-183 (1907).

<sup>5</sup> Edward D. Neill, *History of the Virginia Company of London, With Letters To And From The First Colony Never Before Printed*, 339-346 (1869).

send abroad without a sufficient partie well armed.” & “That men go not to worke in the ground without their arms (and a centinell upon them.)” (March 1623) Va. Stat. at Large, 1 Hening 127 (1823).

The response to the murder of Thomas Barton and his family in Fairfax County by a Native American attack was to raise the militia of every able-bodied man who were required to supply their own weapons. “The Rangers continue their duty according to your Excellency’s commands...The neighbors having fitted out their sons and other young men well acquaint, so their ranging is as low as my Plantation at Pohick...The Inhabitants still continue from their houses, but abundance better satisfied since part of the Rangers is constantly ranging among them.” Col. George Mason to Governor Nicholson July 10, 1700. Kate M. Rowland, 1 *The Life of George Mason, 1725-1792*, at 25-27 (1892).

These legislative and military decisions were the backbone of the British militia system in Virginia.<sup>6</sup> To disarm the people who were the militia<sup>7</sup> would have been suicidal and would have encouraged more attacks. As Thomas Jefferson later wrote about the constitutions of the various states including Virginia’s constitution, “that it is their right and duty

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<sup>6</sup> Military Commission of Thomas Jefferson, June 10, 1770: <http://www.virginia1774.org/TJCommission.html>

<sup>7</sup> “All our freeman are bound to be trained every month” Governor William Berkeley (1671) *Amicus, supra* at 6-7.

to be at all times armed...” Letter from Thomas Jefferson to Major John Cartwright (June 5, 1824). *Amicus, supra* at 29.

The United States Constitution’s lack of protections for the liberties of the people caused George Mason to propose that there be a Federal Bill of Rights to include a militia clause that is now commonly known as the Second Amendment. *Amicus, supra* at 13-14.

[o]nce a standing army is established, in any country, the people lose their liberty. When against a regular and disciplined army, yeomanry are the only defence—yeomanry, unskillful & unarmed, what chance is there for preserving freedom? Give me leave to recur to the pages of history, to warn you of your present danger...I consider and fear the natural propensity of rulers to oppress the people. I wish only to prevent them from doing evil. By these amendments, I would give necessary power, but no unnecessary power. If the clause stands as it is now, it will take from the state legislatures what divine providence has given to every individual – the means of self-defence. Statement of Colonel George Mason (June 14, 1788) *An Amendment to the Constitution is Needed to Prevent the Danger of a Standing Army*, in 3 *The Papers of George Mason, 1725-1792*, at 1075-1076 (Robert A. Rutland ed. 1970).

George Mason’s use of the term, “the means of self-defence” as contrasted to “the right of self-defence” in the context above, clearly shows that possession of arms were regarded as natural or divine rights and necessary for the individual right of self-preservation. George Mason’s idea encapsulated in his statement above was the understanding and

interpretation of the Virginia Declaration of Rights of 1776 that provided for self-preservation, societal defense, and the means to resist a tyrannical government. *Amicus, supra* at 17, 26-28.

Virginia recognizes the doctrine of co-extensive protections as espoused in *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449 (1824) (“The numerous restrictions imposed on this class of people in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States, as respects the free whites, demonstrate, that, here, those instruments have not been considered to extend equally to both classes of our population. We will only instance the restriction upon the migration of free blacks into this State, and upon their right to bear arms.”). “We start therefore with a strong presumption that the Second Amendment right is exercised individually and belongs to all Americans.” *Heller*, 128 S. Ct., 2783, at 2791. This enforces the U.S. Const. Amend. II., against the Commonwealth and its agencies. See also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846-851 (1992).

Although Va. Const. Art. I, § 13 and U.S. Const. Amend. II are similar in purpose, Virginia’s constitutional provision contains greater explicit protections and requirements than the U.S. Const. Amend. II. This Court is

bound by Virginia's extra constitutional limitations and protections imposed by the people of Virginia through Va. Const. Art. I, § 13. *Kamper v. Hawkins*, 3 Va. (1 Va. Cases) 20, at 59 (“What is the constitution but the great contract of the people”); *Custis v. Lane*, 17 Va. (3 Munf.) 579, 593 (1813)(“[t]he declaration of rights... purports to settle the rights and the duties of those who are parties to the compact.”); *Mapp v. Ohio*, 367 U.S. 643, 659 (1961)(“Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980)(A state has the “right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution”).

### **B. Dicta Cannot be Cited as Authority**

When the trial court determined that GMU's regulation was in fact a restriction upon Va. Const. Art. I, § 13 and the U.S. Const. Amend. II. (J.A. at 177), the inquiry should have been at an end and the regulation declared unconstitutional. Va. Const. Art. I, § 13 is not a recommendation but a command and restriction upon the government by the people to protect *their* rights. A tangential law or regulation may be constitutionally permissible when it is outside the historic scope of the right. Prohibiting

enemy combatants<sup>8</sup> and felons from possessing firearms, and reckless discharge<sup>9</sup> or use would be constitutional, but the legislature or its agents cannot restrict or infringe upon a self-executing constitutional provision within the historic understanding of the right in Virginia. *Kemper v Hawkins*, 3 Va. (1 Va. Cases) at 47-48, 82-83 (The powers of the legislature are limited by the constitution as the constitution is the fundamental law). The Constitution of Virginia was amended in order to disqualify anyone who fought a duel or sent or accepted a challenge to fight a duel to hold any office or position of trust in Virginia. *Royall v. Thomas*, 69 Va. (28 Gratt.) 130 (1877).

The analysis by the trial court invoking the now infamous *obiter dicta* quote in *Heller*, 128 S. Ct. at 2816-2817 and then turning to the vacated opinion of *Nordyke v. King*, 563 F. 3<sup>rd</sup> 439, 459 (9<sup>th</sup> Cir. 2009) for its reciting of the dicta in *Heller* was error upon error. As eloquently stated by Chief Justice John Marshall:

It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the

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<sup>8</sup> *An act for disarming Papists, and Reputed Papists, refusing to take the oaths to the government* (1756) Va. Stat. at Large, 7 Hening 35-39 (1823); *An Act to oblige the free male inhabitants of this state above a certain age to give assurance of Allegiance to the same, and for other purposes* (1777) Va. Stat. at Large, 9 Hening 282 (1823) (“[s]uch recusants to be disarmed”).

<sup>9</sup> *Daingerfield v. Thompson*, 74 Va. (33 Gratt.) 136 (1880).

case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. *Cooper v. Commonwealth*, 54 Va. App. 558, 571, 680 S.E.2d 361, 367-68 (2009) (Citing *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399-400 (1821)).

### **C. GMU is not a “Sensitive” Place**

GMU’s regulation is not long standing which is the first prong of the dicta test in *Heller* 128 S. Ct. at 2816-2817 and as such GMU’s regulation fails that simple dicta criteria. More importantly it was stated by the counsel for GMU at trial that, “George Mason University has been formed to provide higher education, not any type of military or gun programs.” (J.A. at 166). GMU was formally a division of the University of Virginia. Compare the assertion of GMU’s counsel with that of the Governor of Virginia, President of the United States, and Founder of the University of Virginia on his views of higher education:

Through the whole of the collegiate course, at the hours of recreation on certain days, all the students should be taught the manual exercise; military evolutions and maneuvers, and should be under a standing organization as a military corps, and with proper officers to train and command them.” Letter of Thomas Jefferson to Peter Carr (Sept. 7, 1814) John C. Henderson, *Thomas Jefferson’s Views on Public Education*, 203 (1890).

When held to the light and truth of history, the *obiter dicta* of *Heller* 128 S. Ct. at 2816-2817 is shattered as Justice Marshall wisely predicted.

In 1785 Thomas Jefferson wrote to his nephew Peter Carr on Peter's education at the College of William and Mary. Jefferson wrote, "[c]onsider what hours you have free from the school and the exercises of the school. Give about two of them every day to exercise; for health must not be sacrificed to learning. A strong body makes the mind strong. As to the species of exercise, I advise the gun. While this gives a moderate exercise to the body, it gives boldness, enterprise, and independence to the mind...Let your gun therefore be the constant companion of your walks." Letter of Thomas Jefferson to Peter Carr (Aug. 19, 1785) in 8 *The Papers of Thomas Jefferson*, 407 (Julian P. Boyd ed. 1953). Thomas Jefferson stated his views in greater detail on college education in 1818:

We have proposed no formal provision for the gymnastics of the school, although a proper object of attention for every institution of youth. These exercises with ancient nations, constituted the principal part of the education of their youth. Their arms and mode of warfare rendered them severe in the extreme; ours, on the same correct principle, should be adapted to our arms and warfare; and the manual exercise, military manoeuvres, and tactics generally, should be the frequent exercises of the students, in their hours of recreation. It is at that age of aptness, docility, and emulation of the practices of manhood, that such things are soonest learnt and longest remembered...The two apartments adjacent to the basement story of the Rotunda shall be appropriated to the gymnastic exercises and games of the

students; among which shall be reckoned military exercises...The students shall attend these exercises and shall be obedient to the military orders of their instructors. Substitutes in the form of arms shall be provided by the University. John S. Patton, *Jefferson, Cabell and the University of Virginia*, 294-295 (1906).

Virginia's Revolutionary leaders learned from history and believed arming and training was the means to a well-regulated militia that was vital to the security of a free state. "In this Time of extreme Danger, with the Indian Enemy in our Country, and threat'ned with the Destruction of our Civil-rights, & Liberty...being sensible of the Expediency of putting the Militia of this Colony upon a more respectable Footing, & hoping to excite others by our Example...That we will use our utmost Endeavours, as well as the Musters of the said Company, as by all other Means in our Power, to make ourselves Masters of the Military Exercise. And that we will always hold ourselves in Readiness, in Case of Necessity, hostile Invasion, or real Danger of the Community of which we are Members." Colonel George Mason, *Fairfax County Militia Association (Sept. 21, 1774)*, in 1 *The Papers of George Mason, 1725-1792*, at 210-211 (Robert A. Rutland ed. 1970).

The right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State.

*Heller*, 128 S. Ct., 2783, at 2809 (quoting with approval *Nunn v. State*, 1 Ga. 243, 251 (1846)).

A place where students have historically been trained in the military exercise to promote the constitutional requirement that the militia be trained to arms, or students have been advised to “let your gun therefore be the constant companion of your walks”, is not a so called “sensitive” place. Imagine the College of William and Mary having in place the same regulation in 1781 and trying to enforce it against General George Washington or Colonel St. George Tucker? Fortunately the infamous dicta in *Heller*, 128 S. Ct. at 2816-2817 did not exist, the College President Reverend James Madison was a patriot, and the students at the college were able to defend the Commonwealth through their student corps. John E. Selby, *The Revolution in Virginia, 1775-1783*, at 133-134, 207, 238 (1988).

A college or university is not a “school” under Va. Code § 18.2-308.1 (*Expressio unius est exclusio alterius*) or under Va. Const. Art. VIII, § 9. Even K-12 schools do not have a total prohibition and allow for firearms and marksmanship training under Va. Code § 18.2-308.1(B), Va. Code § 18.2-280(B-D), & Va. Code § 22.1-277.07(D&F). As the Court stated:

We know, as a matter of fact, that at the age of eighteen, a man is capable intellectually and physically of bearing arms; and that it is the military age recognized by the whole

legislation of Congress, and of the State of Virginia, and of all the States of the Union, perhaps without exception. *United States v. Blakeney*, 44 Va. (3 Gratt.) 405, 418 (1847). During the war of the revolution, sixteen was the military age. All of that age were enrolled in the militia, subject to be drafted, or called out en masse; as was the case in our last war with England, in some of the lower counties of Virginia. In the war of the revolution, too, commissions were given to many who were not twenty-one years of age. I myself received a commission as first lieutenant in Col. Harrison's regiment of artillery, before I was seventeen years of age, whilst I was at school; and served three years, to the end of the war. The military age absolved all from the control of parents, guardians, or masters, as to military engagements and service, as of higher obligations to the country. *Id.* at 441.

In 1848 muskets were issued for the instruction of the pupils in military exercises. Alfred J. Morrison, *The Beginnings of Public Education in Virginia, 1776-1860*, 164-165 (1917).

GMU and the trial court's legal position is baseless as the 2008 Opinion of the Attorney General under footnote 29 does not list universities as places where the open carry of firearms is prohibited three months after the *Heller* decision was issued and where the *Heller* decision is quoted in footnote 8. Op. Va. Att'y Gen. No. 08-043 (Sep. 2008). The Attorney General did not recognize GMU's regulation because "[t]he General Assembly alone has power to define crimes against this Commonwealth. This power cannot be delegated to the courts or to individuals or

corporations.” *Taylor v. Commonwealth*, 187 Va. 214, 220, 46 S.E.2d 384, 387 (1948).

It is further baseless and pernicious that GMU’s regulation under 8VAC35-60-20 and Va. Code § 18.2-308.2(B) permits a convicted felon as a “police officer” who has committed a great crime against society to be armed, while law-abiding citizens as the militia are disarmed by the same regulation. Convicts were not allowed in the Virginia Militia. “Yet all the persons aforesaid, shall, and are hereby required, to send one able-bodied man, not being a convict.” *An Act, for the better Regulation of the Militia* (1738), Va. Stat. at Large, 5 Hening 16-17 (1823). “The legality of an ordinance is to be tested not by what has been done under it, but what may by its authority be done under it.” *Assaid v. Roanoke*, 179 Va. 47, 51, 18 S.E.2d 287, 288 (1941).

An installation policed by armed felons under the color of the law cannot logically be a “sensitive” place or a safe place. The deliberate arming of felons and their baleful union with the government is one of the conditions that Va. Const. Art. I, § 13 was designed to protect against. As was explained in the trial of July 22, 2009, the term “composed of the body of the people” was meant to keep the militia free of mercenaries, foreigners, or confined to a select militia. (J.A. at 122-125); 3 *The Papers of*

*George Mason, 1725-1792*, at 1080-1081 (Robert A. Rutland ed. 1970).

Police forces are not the militia but are full time mercenary “troops” under Va. Code § 44-6.

The distinction is clear. “This company is essentially different from a common collection of mercenary soldiers. It was formed upon the liberal sentiments of public good, for the great and useful purposes of defending our country, and preserving those inestimable rights which we inherit from our ancestors...” George Mason, *Remarks on Annual Elections for the Fairfax Independent Company* (April 1775) in 1 *The Papers of George Mason*, 229-232 (Robert A. Rutland ed. 1970). The term mercenary in Colonial Virginia meant one who acts chiefly for pay or profit as opposed to a civic duty and in 1645 “mercenary attorneys” were outlawed. Va. Stat. at Large, 1 Hening 302 (1823). The people through the *posse comitatus* and participating as militia patrollers kept the peace, answered the Hue and Cry, and apprehended criminals as a civic duty, not for pay or profit. *Uzzle v. Commonwealth*, 107 Va. 919, 921-25, 60 S.E. 52, 53-54 (1908). (J.A. at 31-32, 118-119).

As this Court stated, “The militia embraces the whole arms bearing population.” *Burroughs v. Peyton*, 57 Va. (16 Gratt.) 470, 482 (1864). “The danger really apprehended, from the grant of the power to raise and

support armies, was that the Federal government would be enabled to raise and keep in its pay an army of mercenary troops with no interests in common with the people; which might be used for the overthrow of their liberties and the destruction of the rights of the states.” *Id.* at 479-80. “That history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms, enabling a select militia or standing army to suppress political opponents.” *Heller*, 128 S. Ct. 2783, at 2801. “[w]e must consider the supposed evil which the framers of the Constitution were endeavoring to eliminate.” *Strawberry Hill Land Corp. v. Starbuck*, 124 Va. 71, 85, 97 S.E. 362, 367 (1918).

The term “sensitive place” as a modern contrived means to prohibit the individual means of self-defense or the militia from defending the community is contrary to Va. Const. Art. I, § 13’s history.

WHEREAS the most proper wayes and means for the strengthening the frontiers of this his majesties most ancient colony and dominion against the invasions and incursions of an enemy by land, and for the better prevention of murthers, robberyes and other spoiles from being comited thereon is thought to be by settling in cohabitations upon the said land frontiers within this government, and that the best method to effect the same will be by encouragements to induce societyes of men to undertake the same...who shall alsoe be continually provided with a well fixt musquett or fuzee, a good pistoll, sharp simeter, tomahauk and five pounds of good clean pistoll powder... *An act for the better*

*strengthening the frontiers and discovering the approaches of an enemy*, 1701, Va. Stat. at Large, 3 Hening 204-209 (1823). See also Letter of Richard Henry Lee to James Monroe (Jan. 5, 1784) *Amicus, supra* at 17. (The people can defend themselves or can request aid from the militia.).

#### **D. The Regulation is Not Narrowly Tailored**

GMU's regulation is not narrowly tailored under the strict scrutiny standard because it is effectually a total ban and violates the historic understanding of the right. The public policy on education can be found in Va. Const. Art. I, § 15 and Va. Const. Art. VIII, § 9. The public policy on the security of a free state and the individual right to keep and bear arms can be found in Va. Const. Art. I, § 13.

GMU is a public university. The trial court's citation of *ACLU v. Mote*, 423 F.3d 438 (4<sup>th</sup> Cir. 2005) for the proposition that, "First, the University traditionally is not open to the public" is misplaced. (J.A. at 177). This case is about personal security and the security of a free state, not First Amendment rights to distribute literature. A public university's lands "are public property... that its grounds and buildings are wholly dedicated to public uses; and that the interest of the public constitutes its ends and aims." *Jones v. Commonwealth*, 267 Va. 218, 222-23, 591 S.E.2d 72, 75 (2004)." *Jones* is controlling, not *ACLU v. Mote*. "The more an owner, for his advantage, opens up his property for use by the public in general, the

more do his rights become circumscribed by the statutory and constitutional rights of those who use it.” *Marsh v. Alabama*, 326 U.S. 501, 506 (1946); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980)(State constitution may override private property “right to exclude others”); *Cf. Brentwood Acad. v. TN Sec. School Ath. Assn.*, 531 U.S. 288 (2001). If a building or event is open to the public then it must be open to all. *Tate v. Department of Development and Conservation*, 133 F.Supp. 53 (E.D. Va. 1955).

As GMU is not a sensitive place, the holding in *Heller*, 128 S. Ct., 2783 at 2822, that a handgun ban in the home is unconstitutional also applies to student residence buildings as the term home and dwelling places are synonymous terms in Virginia. *Giles v. Commonwealth*, 277 Va. 369, 375, 672 S.E.2d 879, 883 (2009); *Alston v. Commonwealth*, 32 Va. App. 661, 665-66, 529 S.E.2d 851, 853-54 (2000). The regulation cannot be narrowly tailored if a provision has already been held to be unconstitutional.

The regulation is not narrowly tailored because the compelling state interest in this case is a well-regulated militia composed of the body of people supplied with their own personal arms for self-defense and societal defense. GMU’s regulation bars the very people who are the militia and only serves to weaken the defense of the state. *United States v.*

*Schwimmer*, 279 U.S. 644, 650 (1929) (“[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. We need not refer to the numerous statutes that contemplate defense of the United States, its Constitution and laws, by armed citizens...Whatever tends to lessen the willingness of citizens to discharge their duty to bear arms in the country’s defense detracts from the strength and safety of the government.”). *Schwimmer* was overturned in part by *Girouard v. United States*, 328 U.S. 61 (1946) to allow for conscientious objectors to become naturalized citizens but its general holding is still valid.

Training the students to arms and allowing the whole arms bearing population to be present and “always in readiness”, is the proper constitutional means of obtaining safety under the Virginia Constitution. “The militia, sir, is our ultimate safety. We can have no security without it...the great object is, that every man be armed.” Statement of Patrick Henry (June 14, 1788), *Amicus, supra* at 15.

The people of Virginia lived in a state of nature after declaring independence on May 15, 1776. They secured the means to achieve safety and security through the Virginia Declaration of Rights § 13, on June 12, 1776. The Commonwealth, Constitution or form of government did not exist

until June 29, 1776. The people as individuals survived without a government and were capable of governing themselves including the bearing of firearms for self-defense and defense of the community through the militia that pre-existed the Constitution of Virginia. As George Mason explained the Virginia Declaration of Rights, “We have ... endeavoured to provide the most effectual Securities for the essential Rights of human nature, both in Civil and Religious liberty.” 1 *The Papers of George Mason, 1725-1792*, 433-437 (Robert A. Rutland ed. 1971). There was not a public place that was off limits to armed full citizens of Virginia in 1776.

An unorganized, unarmed, untrained and undisciplined militia is not a well-regulated militia. “But your first object should be a well-regulated Militia Law; the people, put under good Officers, would behave in quite another Manner; and not only render real Service as Soldiers, but would protect, instead of distressing, the Inhabitants.” Letter of George Washington to Governor William Livingston (NJ) (Jan. 24, 1777), in 7 *The Writings of George Washington from the Original Manuscript Sources 1745 - 1799*, 56 (J. Fitzpatrick ed. 1932). As this Court noted, “An army is a body of men whose business is war: the militia a body of men composed of citizens occupied ordinarily in the pursuits of civil life, but **organized** for **discipline** and **drill** (emphasis added), and called into the field for temporary military

service when the exigencies of the country require it.” *Burroughs*, 57 Va. (16 Gratt.) at 475. Under 32 U.S.C. 109(c) a state may organize its own militia separate from the National Guard. *Perpich v. DOD*, 496 U.S. 334, 352 (1990).

GMU wants this Court to help destroy the militia of this Commonwealth by disarming the people and disusing the militia as college students are not exempt from militia duty under Va. Code § 44-5.

An instance within the memory of some of this house, will shew us how our militia may be destroyed. Forty years ago, when the resolution of enslaving America was formed in Great-Britain, the British parliament was advised by an artful man, [Sir William Keith] who was governor of Pennsylvania, to disarm the people. That it was the best and most effectual way to enslave them. But that they should not do it openly; but to weaken them and let them sink gradually, by totally disusing and neglecting the militia. [Here Mr. Mason quoted sundry passages to this effect.] This was a most iniquitous project. Why should we not provide against the danger of having our militia, our real and natural strength, destroyed?” Statement of Colonel George Mason, (June 14, 1788) in 3 *The Papers of George Mason, 1725-1792*, at 1074-1075 (Robert A. Rutland ed 1970).

GMU wants this Court to declare that individuals cannot be trusted and deny them the means of self-defense. This of course this Court cannot do. *Heller*, 128 S. Ct. 2783, at 2801 (Self-defense is the central component of the right).

Individuals apart from their required compulsory militia service have a “right to possess and carry weapons in case of confrontation”. *Heller*, 128 S. Ct. 2783, at 2797. “When a man quits the state of nature and enters into a state of society...he retains the right to repel force by force; because that may be absolutely necessary for self-preservation, and the intervention of society in his behalf may be too late to prevent an injury.” 1 St. George Tucker, *Blackstone’s Commentaries: With Notes and Reference, to the Constitution and laws of the Federal Government of the United States and of the Commonwealth of Virginia*, 145-146, n. 42 (William W. Birch & Adam Small 1803)(Also cited in *Heller*, 128 S. Ct. 2783, at 2799). “The right of self-defence is the first law of nature.” 1 Tucker, *Blackstone’s Commentaries*, app. at 300. Therefore, the right to bear arms was constitutionally protected outside of the home apart from militia duty. 5 Tucker, *Blackstone’s Commentaries, Concerning Treason*, app. at 19. This also included concealed arms in Virginia. (J.A. at 98).

What is the meaning of our retinues, what of our swords? Surely it would never be permitted to us to have them if we might never use them. This, therefore, is a law, O judges, not written, but born with us, which we have not learnt, or received by tradition, or read, but which we have taken and sucked in and imbibed from nature herself; a law which we were not taught, but to which we were made, which we were not trained in, but which is ingrained in us, namely, that if our life be in danger from plots, or from open violence, or from the weapons of robbers or enemies, every means of

securing our safety is honorable. For laws are silent when arms are raised, and do not expect themselves to be waited for, when he who waits will have to suffer an undeserved penalty before he can exact a merited punishment. *Selected Orations of Marcus Cicero, The Speech of Marcus T. Cicero in Defence of Titus Annius Milo*, 178 (C.D. Yonge trans. 1892). The man who laid the plot was defeated; violence was defeated by violence; or, I should rather say, audacity was crushed by valor. I say nothing about what the republic, nothing about what you, nothing about what all good men gained by the result...reason has taught this lesson to learned men, and necessity to barbarians, and custom to all nations, and nature itself to the beasts, that they are at all times to repel all violence by whatever means they can from their persons, from their liberties, and from their lives, then you cannot decide this action to have been wrong, without deciding at the same time that all men who fall among thieves must perish, either by their weapons, or by your sentence. *Id.*, at 185-186.

To be forced to give up one's personal safety and security to the government is to no longer be a free and independent human in direct violation of Va. Const. Art. I, §§ 1-2, & 13. *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 276-77 (1828) ("Liberty itself consists essentially, as well in the security of private property, as of the persons of individuals"); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (Being compelled to hold one's life or giving up any material right to another is the essence of slavery). "In America we may reasonably hope that the people will never cease to regard the right of keeping and bearing arms as the surest pledge of their

liberty.” St. George Tucker, 3 *Tucker*, *Blackstone’s Commentaries, Of Title to Things Personal by Occupancy*, n. 3, at 414.

“[t]he exercise of the police power must be a valid exercise thereof, and when in its exercise it encounters the barriers erected by the State and Federal Constitutions, it can proceed no further.” *Assaid*, 179 Va. at 50, 18 S.E.2d at 288. GMU’s total prohibition on the inalienable means and right to self-defense cannot be deemed narrowly tailored with the denial of the use of GMU’s facilities. “The primary goal of every university is to educate, not regulate its students.” *George Mason University v. Floyd*, 275 Va. 32, 37, 654 S.E.2d 556, 558 (2008). GMU has not met its burden under the strict scrutiny standard or the self-executing standard. “[a] State may not impose a penalty upon those who exercise a right guaranteed by the Constitution. Constitutional rights would be of little value if they could be . . . indirectly denied . . . or ‘manipulated out of existence’.” *Harman v. Forssenius*, 380 U.S. 528, 540 (1965); *Ohree v. Commonwealth*, 26 Va. App. 299, 305, 494 S.E.2d 484, 487 (1998).

### **E. Violation of the Fourteenth Amendment**

There is no compelling or plausible state interest, or reasonableness in allowing convicted felon mercenaries to be armed and having unlimited access to the university while at the same time disarming law-abiding

citizens. “That no person whatsoever, already convicted...shall...bear any office, ecclesiasticall, civill, or military, or be in any place of public trust or power, within this her majestys colony and dominion of Virginia.” *An Act Declaring Who shall not Bear Office in this Country* (1705), Va. Stat. at Large, 3 Hening 250-252 (1823). “Because it would be a great inconvenience if every private man upon pretence of suspicion should break open houses, for they may not be of known value or responsible; but a constable is an officer known within the vill, and his authority known, and is presumed of sufficiency, for he is chosen by the leet.” *2 Hale’s Pleas of the Crown*, 92 (London 1800).

Constables in Virginia were not mercenaries and were usually men of “considerable prominence and influence”. Philip A. Bruce, *1 Institutional History of Virginia in the Seventeenth Century*, 602 (1910). Constables were appointed every two years by the county courts and had to give a bond for the office. William W. Hening, *The New Virginia Justice, Comprising the Office and Authority of a Justice of the Peace*, 192-196 (1810). Felons or *jaile birds* were not trustworthy and would never have been chosen or allowed as constables but would generally have been put to death unless saved by benefit of clergy, Va. Stat. at Large, 4 Hening 325

(1823), or not allowed in the colony. Va. Stat. at Large, 1 Hening 509-10 (1823).

GMU's regulation violates the due process and equal protection clauses of the U.S. Const. Amend. XIV. The constitution was created for the good people of Virginia, not convicted government felons. *Custis*, 17 Va. (3 Munf.) at 593. GMU instituted this regulation to apparently achieve safety, but allowing armed felons and denying armed private law-abiding citizens who constitute the militia from the university is not a reasonable classification or a rational response. *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). "The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446-47 (1985); *Ballard*, 228 Va. at 217, 321 S.E.2d at 286. Suspect classifications that affect a fundamental right are presumed unconstitutional under the strict scrutiny standard. *Mahan v. NCPAC*, 227 Va. 330, 335-36, 315 S.E.2d 829, 832 (1984).

It is far more likely that an armed felon mercenary under the color of law would act violently after being jilted by a female student as part of the doomsday scenario proffered by GMU (J.A. at 54-55) than by a law-abiding citizen. "Because lessons of common experience [reveal] that possession

of firearms by felons presents a high risk of harm to others”. *Mayhew v. Commonwealth*, 20 Va. App. 484, 491, 458 S.E.2d 305, 308 (1995). “[w]e have recognized that liberty rights of convicted felons may be curtailed more than those of the general populace” *McCabe*, 274 Va. at 565, 650 S.E.2d at 512. The opposite is not true. The regulation defeats the very purpose for which it was created and is an unconstitutional exercise of the police power. *Alford v. City of Newport News*, 220 Va. 584, 586, 260 S.E.2d 241, 243 (1979).

Furthermore, the servant cannot be greater than the master and deny to the master what he has reserved to himself, the individual means of self-defense and a well-regulated militia, composed of the body of the people. These are fundamental rights deeply rooted in Virginia’s history. Va. Const. Art. I, §§ 2 & 13; *Glucksberg*, 520 U.S. at 719-721. Disarming the people and creating a select militia, hiring mercenaries, exempting government officials from the bans to consolidate power and to suppress political opponents or undesirables has historically been the path of all governments including Virginia. Therefore law-abiding private citizens as the militia are a suspect class when their fundamental right to keep and bear arms are denied or curtailed by the government. *Cleburne*, 473 U.S. 432 at 440-41.

“[a] court should look to the history of the times and examine the state of things existing when the constitution was framed and adopted by those who wrote it in order to ascertain the prior law, the mischief, and the remedy.” *Almond v. Day*, 197 Va. 782, 787, 91 S.E.2d 660, 664 (1956); *Dean v. Paolicelli*, 194 Va. 219, 226, 72 S.E.2d 506, 511 (1952). “The right existed at the adoption of the constitution; it then had no limits short of the moral power of the citizens to exercise it and it in fact consisted in nothing else but in the liberty of the citizens to bear arms.” *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 92 (1822).

“We have thus taken a short view of the principal absolute rights of individuals. To secure their enjoyment, however, certain protections or barriers have been erected, which serve to maintain inviolate the three primary rights of personal security, personal liberty, and private property. These may in America be said to be...2.The Right of bearing arms...and is among his most valuable privileges, since it furnishes the means of resisting, as a freeman ought, the inroads of usurpation.” Henry St. George Tucker, 1 *Commentaries on the Laws of Virginia Comprising the Substance of a Course of Lectures Delivered to the Winchester Law School*, 43 (Winchester 1836). GMU’s Regulation 8VAC35-60-20 is plainly unconstitutional as applied to Mr. DiGiacinto.

**II. VA. CONST. ART. I, § 14 IS A SELF-EXECUTING CONSTITUTIONAL PROVISION AND SOVEREIGN IMMUNITY HAS BEEN WAIVED. GMU CANNOT BE SEPARATE FROM OR INDEPENDENT OF THE COMMONWEALTH. GMU DOES NOT HAVE THE DELEGATED AUTHORITY TO PROMULGATE REGULATION 8VAC35-60-20 OR TO SUSPEND THE EXECUTION OF THE LAWS BY MAINTAINING A REGULATION INCONSISTENT WITH THE GENERAL LAWS OF THE COMMONWEALTH UNDER VA. CODE § 23-91.24 ET SEQ AND VA. CODE § 1-248.**

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. Va. Const. Art. I, § 14.

**A. Va. Const. Art. I, § 14 Is Self-executing And Waives GMU's Sovereign Immunity**

It is clear that Va. Const. Art. I, § 14 is a part of the Virginia Bill of Rights. It is of a negative or prohibitive character and because it acts without the need for legislation to be enforced or the right enjoyed, it is a self-executing constitutional provision that waives GMU's sovereign immunity under *Gray*, 276 Va. at 103-6, 662 S.E.2d at 71-73. Any doubt is erased by history.

One of the first intercessions of the Virginia Declaration of Rights involved Va. Const. Art. I, § 14. Virginia denied the Transylvania Company a proprietary government because of this provision. Henry Mayer, *A Son of Thunder: Patrick Henry and the American Republic*, 314 (1991). George

Mason wrote the *Remonstrance of the General Assembly of Virginia, to the delegates of the United American States in Congress assembled*, in December of 1779 because of Congress' attempt to allow the erection of a separate government in Virginia by the Vandalia and Indiana Companies in violation of Va. Const. Art. I, § 14. Va. Stat. at Large, 10 Hening, 557 (1823); Kate M. Rowland, 1 *The Life of George Mason, 1725-1792*, 341-344 (1892).

This Court later ruled on the matter of unlawful authority and Va. Const. Art. I, § 14 in 1793 with Justice Roane stating the following:

To come now more immediately to the question before the court; can those who are appointed judges in chancery, by an act of assembly, without ballot, and without commission during good behavior, constitutionally exercise that office? The fourteenth article of the Virginia Constitution recites '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.' Here then is a general principle pervading all the courts mentioned in the Constitution from which, without an exception, we ought not to depart. If those may be judges who are not appointed by joint ballot, but by an act of assembly, the senate have in that instance more power than the Constitution intended; for they control the other branch, by their negative upon the law...For these reasons, and others which it would be tedious to enumerate, I am of opinion, that the clause in question, is repugnant to the fundamental principles of the Constitution, in as much as the judges of the general court have not been balloted for and commissioned as judges in chancery, pursuant to the fourteenth article of the Constitution. *Kemper v. Hawkins*, 3 Va. (1 Va. Cases) 20, 40-42 (1793). See also *Poindexter v.*

*Greenhow*, 114 U.S. 270, 290-93 (1885)(An agent acting outside of their authority is not the state and has no immunity.).

Ten years after being a justice in *Kemper v. Hawkins*, St. George Tucker published his iconic work on *Blackstone's Commentaries* and wrote again about the issue. "A second branch of high treason against the *state*, consists in erecting or establishing or causing or procuring to be erected or established, any government separate from, or independent of the government of Virginia, within the limits thereof, unless by act of the legislature of this commonwealth for that purpose **first obtained** (emphasis added)" 4 Tucker, *Blackstone's Commentaries, Appendix, Concerning Treason*, at 22-23. See also Va. Stat. at Large, 12 Hening, 41-42 (1823); Va. Code § 18.2-481.

In *Phillips v. Rector and Visitors of Univ. of Va.*, 97 Va. 472, 475, 34 S.E. 66, 67 (1899) this Court held that the University could not contract debt "without the consent of the General Assembly previously obtained." This restriction is congruent with the first law in 1819 establishing the University of Virginia to which the university was to conform to the laws of the General Assembly and be at all times under the control of the General Assembly. The Rector and Visitors could not pass student regulations "contrary to the laws of the land". 1 *The Revised Code of the Laws of*

*Virginia*, Chap. 34, 90-93 (Richmond 1819). Likewise, GMU under Va. Codes §§ 23-91.24 and 23-91.29 cannot promulgate regulations without prior consent of the General Assembly or be inconsistent with state law. GMU's relationship is more akin to a local government. Like a local government, GMU cannot "forbid what the legislature has expressly licensed, authorized, or required." *Blanton v. Amelia County*, 261 Va. 55, 64, 540 S.E.2d 869, 874 (2001). GMU's enabling legislation is to be strictly construed against the University under the Constitution and by Va. Code § 1-248. To allow a regulation that conflicts with the general laws suspends the operation or execution of those laws, and creates a dispensing power over the laws which is forbidden by Va. Const. Art. I, § 7.

### **B. Statutory Rights Are Actionable In The Courts**

Whether GMU's regulation is inconsistent with Va. Codes § 55-248.9(A)(6), § 18.2-287.4 and § 18.2-308(D) is actionable under Va. Code § 8.01-184 because these general laws define the limitation of GMU's authority under Va. Code § 23-91.29. "And the law is the definition and limitation of power." *Yick Wo*, 118 U.S. 356, at 370.; *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 \_\_ WL1492308 (Colo. App. April 2010)(University campus safety regulations cannot be inconsistent with state law and prohibit concealed carry permit holders as the University is also bound by local preemption of firearm laws.). Therefore the trial court erred in stating that GMU's regulation was not inconsistent with the general laws and that this was not a constitutional issue. (J.A. at 6 ¶26, 180-182).

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection...it is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or action at law whenever that right is invaded. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

Mr. DiGiacinto cannot be deprived of his liberty or rights without due process of law when penal laws are at issue. U.S. Const. Amend. XIV.; *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964)("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577-78 (1972)(Property interests created by statute are protected by due process.).

GMU must rely on the general trespass statute Va. Code § 18.2-119 to enforce its regulation. Neither the General Assembly nor the people

through the Constitution have made it a crime to possess firearms at universities. GMU cannot do indirectly what it cannot do directly. *Marshall*, 275 Va. at 435, 657 S.E.2d at 80 (2008); *Taylor*, 187 Va. at 220, 46 S.E.2d at 387.

George Mason wrote in the Fairfax County Resolves of 1774 the following:

RESOLVED that the most important and valuable Part of the British Constitution, upon which its very Existence depends, is the fundamental Principle of the People's being governed by no Laws, to which they have not given their Consent, by Representatives freely chosen by themselves; who are affected by the Laws they enact equally with their Constituents. George Mason, *Fairfax County Resolves* (July 18, 1774) 1 *The Papers of George Mason, 1725-1792*, at 201-202 (Robert A. Rutland ed. 1970).

George Mason later transformed this idea into Va. Const. Art. I, §§ 6 & 7 and Virginia Const. Art. IV, § 1. GMU is not the representatives of the people. The Rector and Visitors of George Mason University do not make public policy. That is reserved to the people through their constitution and the General Assembly. *Infants et al. v. Virginia Housing Development Authority*, 221 Va. 659, 671, 272 S.E.2d 649, 656 (1980); *Chauncey Hutter, Inc. v. VEC*, 50 Va. App. 590, 600, 652 S.E.2d 151, 156 (2007).

This is an ancient concept. Marcus Cicero correctly challenged the authority of the Roman laws:

Has then the Roman people adopted this law? ...was it ever regularly promulgated? ...Can these laws be ratified without the destruction of all other laws?... On which account I give my vote that those laws which Marcus Antonius is said to have carried were all carried by violence, and in violation of the auspices; and that the people are not bound by them. *Selected Orations of Marcus Cicero, The Fifth Philippic*, 373-374 (C.D. Yonge trans. 1892).

Under Va. Const. Art. IV, § 1: “The legislative power of the Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and House of Delegates”. As a general principle the legislature cannot delegate away their power given to them exclusively by the people to govern the people’s affairs. *Delaplane v. Crenshaw*, 56 Va. (15 Gratt.) 457, 475 (1860)(“[t]he constitution vests the whole law-making power in the legislature...It would savor more of encroachment upon the rights of the people to say that they should be bound by a law which had never been assented to by them through their proper representatives.”); *Stuart’s Ex’rs v. Board of Sinking Fund Com’rs*, 123 Va. 224, 229, 96 S.E. 239, 241 (1918)(“The legislature cannot delegate its power to make law”). For if the legislature can delegate away part or all of their law making power, then the entity to which they have delegated the power can usurp the Constitutional restrictions established by the people and suspend the execution of the laws or erect a separate government in violation of Va. Const. Art. I, §§ 6, 7 & 14. “The Virginia Constitution is a restriction of powers, establishing the

limits of governmental action”. *Town of Madison, Inc. v. Ford*, 255 Va. 429, 432, 498 S.E.2d 235, 236 (1998); *Kemper v. Hawkins*, 3 Va. (1 Va. Cases) at 24.

This Court has consistently held that any delegation of legislative powers by the General Assembly are valid only if they establish specific policies and fix definite standards to guide the official, agency, or board in the exercise of the power. *Ames v. Town of Painter*, 239 Va. 343, 349, 389 S.E.2d 702, 705 (1990); *Assaid*, 179 Va. at 50-51, 18 S.E.2d at 288; *Marshall*, 275 Va. at 431-36, 657 S.E.2d at 77-80 (2008). Language in an enabling statute which provides merely that the regulations be designed to protect and promote the safety and health of employees or the public welfare are void. *Avalon Assisted Living Facilities, Inc. v. Zager*, 39 Va. App. 484, 508, 574 S.E.2d 298, 309-10 (2002); *Andrews v. Board of Supervisors*, 200 Va. 637, 641, 107 S.E.2d 445, 448 (1959); *Students for Concealed Carry on Campus, LLC*. \_\_ P.3d \_\_ WL1492308 at 5. (University Safety regulations preempted by concealed carry law.)

The trial court erred in holding that GMU’s regulation is valid as applied to Mr. DiGiacinto because GMU has no authority to pass Regulation 8VAC35-60-20 and therefore the regulation is an *ultra vires* act and void *ab initio*. “there is no position which depends on clearer principles,

than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.” *Kamper v. Hawkins*, 3 Va. (1 Va. cases) at 82; *Safeway Stores v. Milk Commission*, 197 Va. 69, 77, 87 S.E.2d 769, 774 (1955)(Commission cannot transgress enabling statutes). The regulation is plainly invalid as applied to Mr. DiGiacinto.

**III. THE GENERAL ASSEMBLY CANNOT ACQUIESCE ITS CONSTITUTIONAL POWERS AWAY OR ACQUIESCE TO GMU’S REGULATION WHEN THE GENERAL ASSEMBLY HAS EXPLICITLY STATED THAT GMU “SHALL BE SUBJECT AT ALL TIMES TO THE CONTROL OF THE GENERAL ASSEMBLY” UNDER VA. CODE § 23-91.24.**

The General Assembly has codified that GMU “shall be subject at all times to the control of the General Assembly” under Va. Code § 23-91.24. It has also codified, “the board of visitors shall be vested with all the rights and powers conferred by the provisions of this title insofar as the same are not inconsistent with the provisions of this chapter and the general laws of the Commonwealth” under Va. Code § 23-91.29. GMU must yield to the will of the General Assembly. The General Assembly cannot acquiesce or delegate its powers away in violation of Va. Const. Art. I, §§ 6 & 7 and Va. Const. Art. IV, § 1. *Delaplane*, 56 Va. (15 Gratt.) 457, at 475.

The General Assembly responded to *Richmond Tenants Org. v. Richmond Redevelopment Housing Authority*, 751 F. Supp. 1204 (E.D. Va. 1990) by amending Va. Code § 55-248.9(A)(6) to prohibit “as a condition of tenancy in public housing to a prohibition or restriction of any lawful possession of a firearm within individual dwelling units unless required by federal law or regulation”. GMU as a provider of public housing cannot disobey the commands of the General Assembly and the public policy of the state. The General Assembly has responded and doesn’t need to respond again. Students at GMU have every right as tenants of public housing to possess firearms otherwise lawfully owned in their residence buildings. The same is true for Mr. DiGiacinto if invited by a student to the residence building.

GMU and the trial court relied upon *Peyton v. Williams*, 206 Va. 595, 600, 145 S.E.2d 147, 151 (1965), (J.A. at 182) for the notion that because two intervening sessions of the General Assembly have passed, the General Assembly has acquiesced to the regulation, but *Peyton* is not sound law as applied to this case. *Safeway Stores*, 197 Va. at 77, 87 S.E.2d at 774. (“It’s authority must affirmatively appear from the statute under which it claims to act... nor does the acquiescence in, or the failure to object, on the part of others lend validity to any such departure.”).

The General Assembly has defeated many bills that would have either given or withheld the power to regulate firearms by a university. The *status quo* must be presumed. The General Assembly spoke about the topic in 1964 stating that no agency should be given the power to regulate the lawful possession or use of firearms. H.J.R. No. 21., House of Delegates 98 (1964)(*Concerning the Inherent Right of Citizens of this Commonwealth to own and bear arms*). The U.S. Supreme Court's decision in *Heller*, 128 S. Ct., 2783 at 2822 has recently invalidated part of the regulation for handguns in the home or dwelling place and therefore the residence buildings at GMU. *Peyton* is limited by the acts of the U.S. Supreme Court and this court's judicial interpretation of statutes pertaining to GMU's authority.

The General Assembly cannot and has not acquiesced to GMU under the Constitution. *Ellinger v. Commonwealth*, 102 Va. 100, 105-6, 45 S.E. 807, 808 (1903); *Kamper v. Hawkins*, 3 Va. (1 Va. Cases) at 29-31.

### **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 Opening Brief of Appellant have been filed with the Clerk of the Supreme Court of Virginia and three (3) copies have been mailed postage prepaid and/or hand delivered to Mr. Stephen R. McCullough, Senior Appellate Counsel, Office of the Attorney General, 900 E. Main St., Richmond, Virginia 23219, on this 5th, day of May, 2010.

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Rudolph DiGiacinto  
Appellant, *pro se*