

Record No. 091934

IN THE SUPREME COURT OF VIRGINIA

RUDOLPH DIGIACINTO,

Appellant

v.

THE RECTOR AND VISITORS OF
GEORGE MASON UNIVERSITY,

Appellee

**BRIEF OF AMICUS CURIAE
NATIONAL RIFLE ASSOCIATION OF AMERICA**

Robert Dowlut
Va. Bar 65141
Telephone: (703) 267-1254
E-mail: rdowlut@nrahq.org

Lindsay K Charles
MA BBO No. 675540
(Pro Hac Vice Pending)
Telephone: (703) 267-1257
E-mail: lcharles@nrahq.org

National Rifle Association
11250 Waples Mill Road
Fairfax, Virginia 22030-9400
Facsimile: (703) 267-3985

Attorneys for Amicus Curiae

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u>	i
<u>STATEMENT OF PARTIES' CONSENT TO FILE</u>	1
<u>STATEMENT OF INTEREST OF AMICUS CURIAE</u>	1
<u>STATEMENT OF CASE</u>	3
<u>STATEMENT OF FACTS</u>	3
<u>ARGUMENT</u>	3
<u>I. The Virginia Constitution Guarantees a Right to Keep and Bear Arms</u>	3
<u>II. The Constitution of the United States Protects Every American's Right to Keep and Bear Arms</u>	13
<u>A. The Second Amendment protects individual liberty from intrusion by federal, state, and local government</u>	13
<u>B. The regulation at issue violates the Second Amendment</u>	20
<u>i. The regulation is not narrowly tailored</u>	20
<u>ii. The regulation does not use the least restrictive means necessary to achieve the government's compelling purpose</u>	22
<u>iii. The regulation may in fact be counterproductive to achieving the government's goal of increased public safety</u>	25
<u>CONCLUSION</u>	27

TABLE OF AUTHORITIES

Cases

<i>Andrews v. State</i> , 50 Tenn. 165, 8 Am. Rep. 8 (1871)	8
<i>Ashcroft v. American Civil Liberties Union</i> , 535 U.S. 564 (2002).....	22
<i>Ballard v. Commonwealth</i> , 228 Va. 213, 321 S.E.2d 284 (1984)	4
<i>Britt v. State</i> , 681 S.E.2d 320 (N.C. 2009)	7
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992)	17
<i>City of Lakewood v. Pillow</i> , 180 Colo. 20, 501 P.2d 744 (1972).....	12
<i>Clark v. Jeter</i> , 486 U.S. 456 (1988).....	14
<i>Cohen v. California</i> , 403 U.S. 15 (1971)	24
<i>Crawford v. United Steelworkers, AFL-CIO</i> , 230 Va. 217, 335 S.E.2d 828 (1985)	6
<i>District of Columbia v. Heller</i> , 128 S.Ct. 2783 (2008)	passim
<i>Glasscock v. City of Chattanooga</i> , 157 Tenn. 518, 11 S.W.2d 678 (1928)	8
<i>Goodridge v. Department of Public Health</i> , 440 Mass. 309, 798 N.E.2d 941 (2003)	10
<i>Jaynes v. Commonwealth</i> , 276 Va. 443, 666 S.E.2d 303 (2008)	4
<i>McDonald v. Chicago</i> , 130 S.Ct. 48, 77 U.S.L.W. 3691 (U.S. Sept. 30, 2009) (No. 08-1521)	3
<i>Opperman v. South Dakota</i> , 428 U.S. 364 (1976)	9
<i>Perry Educ. Ass’n v. Perry Local Educators’ Ass’n</i> , 460 U.S. 37 (1983)	14
<i>Pruneyard Shopping Center v. Robins</i> , 447 U.S. 74 (1980)	10
<i>San Antonio Indep. Sch. Dist. v. Rodriguez</i> , 411 U.S. 1, 16 (1973)	14
<i>State ex rel. City of Princeton v. Buckner</i> , 180 W.Va. 457, 377 S.E.2d 139 (1988)	10, 12
<i>State v. Bias</i> , 37 La. Ann. 259 (1885)	7
<i>State v. Blocker</i> , 291 Or. 255, 630 P.2d 824 (1981)	11
<i>State v. Kerner</i> , 181 N.C. 574, 107 S.E. 222 (1921).....	7
<i>State v. Opperman</i> , 247 N.W.2d 673 (S.D. 1976).....	10
<i>Students for Concealed Carry v. Regents of the University of Colorado</i> , No. 09CA1230, 2010 WL 1492308 (Colo. App. April 15, 2010).....	11
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989).....	23
<i>Thompson v. Western States Medical Center</i> , 535 U.S. 357 (2002)	17

<i>Turner Broadcasting System, Inc. v. FCC</i> , 520 U.S. 180 (1997)	17
<i>Ullmann v. United States</i> , 350 U.S. 422 (1956)	20
<i>United States v. Playboy Entm't Group, Inc.</i> , 529 U.S. 803 (2000)	21, 23
<i>United States v. Skoien</i> , 587 F.3d 803 (7th Cir. 2009).....	20
<i>Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.</i> , 454 U.S. 464 (1982).....	19
<i>Wilson v. State</i> , 33 Ark. 557, 34 Am.Rep. 52 (1878)	9
<i>Zauderer v. Office of Disciplinary Counsel of Supreme Court</i> , 471 U.S. 626 (1985)	14
Statutes	
Va. Code § 18.2-308(D)	10
Other Authorities	
Brief for Respondents the National Rifle Association of America, Inc. Et Al. in Support of Petitioners, <i>McDonald v. Chicago</i> , 2009 WL 3844394 (U.S. Nov. 16, 2009) (No. 08-1521)	13
Brief of United States in <i>Heller</i>	17
CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, http://webappa.cdc.gov/cgi- bin/broker.exe	24
Def. Open. Br.....	21, 22, 23
Diane Suchetka, <i>Ex-Charlottean: I Helped Nab Suspect; Scene “Looked Like Somebody Had Mopped the Floor With Blood,”</i> CHARLOTTE OBSERVER (North Carolina), January 18, 2002	26
Eugene Volokh, <i>State Constitutional Rights to Keep and Bear Arms</i> , 11 TEX. REV. OF LAW & POLITICS 191 (2006)	6
<i>Heller</i> Transcript	19
PREVENTING SCHOOL SHOOTINGS: A SUMMARY OF A U.S. SECRET SERVICE SAFE SCHOOL INITIATIVE REPORT, <i>available at</i> http://www.ncjrs.gov/pdffiles1/jr000248c.pdf	25
Proceedings & Debates of Virginia Senate Pertaining to Amendment of Constitution 393 (April 3, 1969).....	5
Rex Bowman, <i>“I Was Sick. I Need Help”; Shocked Town Still Grasps for Answers</i> , RICHMOND TIMES DISPATCH (Virginia), January 18, 2002.....	26
Robert Dowlut & Janet A. Knoop, <i>State Constitutions and the Right to Keep and Bear Arms</i> , 7 OKLA. CITY UNIV. L. REV. 177 (1982).....	5
Va. Atty. Gen. Opinion No. 05-078 (Jan. 4, 2006)	6

Wayne Laugesen, *A principal and his gun*, BOULDER WEEKLY
(Colorado), Oct. 15, 1999, available at
<http://www.davekopel.com/2a/othwr/principal&gun.htm>26, 27

Constitutional Provisions

ARK. CONST. art. II, § 5 (1868)	8
VA CONST. art. I, § 13	3
LA. CONST. art. 3 (1879).....	7
N.C. CONST. art. I, § 24 (1876)	6
TENN. CONST. art. I, § 26.....	8

STATEMENT OF PARTIES' CONSENT TO FILE AMICUS CURIAE BRIEF

All parties have consented in writing to the filing of this amicus curiae brief. Rudolph DiGiacinto consented on behalf of the appellant. Steve McCullough, Senior Appellate Counsel in the Office of the Attorney General, consented on behalf of the appellee. This brief is filed in support of appellant in that it seeks reversal of the judgment below.

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Rifle Association of America (NRA) is a New York not-for-profit membership corporation founded in 1871. The NRA has over four million individual members and 10,700 affiliated members (clubs and associations) nationwide. Among its purposes, as set forth in its Bylaws, are:

1. To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and

defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens;

2. To promote public safety, law and order, and the national defense;

3. To train members of law enforcement agencies, the armed forces, the militia, and people of good repute in marksmanship and in the safe handling and efficient use of small arms;

4. To foster and promote the shooting sports, including the advancement of amateur competitions in marksmanship at the local, state, regional, national, and international levels;

5. To promote hunter safety, and to promote and defend hunting as a shooting sport and as a viable and necessary method of fostering the propagation, growth and conservation, and wise use of our renewable wildlife resources.

The court's decision in this case, particularly regarding the standard of review, is not only of general interest to the NRA and its members, but it also may materially affect the NRA's interests in other pending and future cases. *See, e.g., National Rifle Association v. Village of Oak Park*, 617 F. Supp. 2d 752 (N.D. Ill. 2008), *aff'd sub*

nom. National Rifle Association v. City of Chicago, 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom. McDonald v. Chicago*, 130 S.Ct. 48, 77 U.S.L.W. 3691 (U.S. Sept. 30, 2009) (No. 08-1521).

STATEMENT OF CASE

Amicus curiae adopts appellant's statement of the case.

STATEMENT OF FACTS

Amicus curiae adopts appellant's statement of facts.

ARGUMENT

Mr. DiGiacinto raises numerous constitutional and statutory grounds for appeal. Amicus will restrict its argument to the guarantee to keep and bear arms under the Virginia Constitution and under the United States Constitution. Moreover, this brief focuses on both the nature of the right protected by the Virginia Constitution and the standard of review under the federal Constitution.

I. The Virginia Constitution Guarantees a Right to Keep and Bear Arms

Article I, § 13 of the Virginia Constitution guarantees:

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.

While some aspects of this provision are nearly as old as the Commonwealth, effective July 1, 1971, the people added to the Constitution of Virginia the unambiguous guarantee that “the right of the people to keep and bear arms shall not be infringed.” Previous constitutions did not have this unambiguous command. The people secured this right for themselves by affirmative vote.

A right is enshrined in the constitution for two major reasons: the right is considered fundamental and it must be jealously protected from infringement. In *Ballard v. Commonwealth*, 228 Va. 213, 216, 321 S.E.2d 284, 286 (1984), this court agreed that “a fundamental right is one explicitly or implicitly guaranteed by the Constitution.” Therefore, a strict scrutiny test should be used. Under strict scrutiny, a statute or regulation “will be deemed constitutional only if it is narrowly drawn to further a compelling state interest.” *Jaynes v. Commonwealth*, 276 Va. 443, 666 S.E.2d 303, 313 (2008), *cert. denied*, 129 S.Ct. 1670 (2009).

There are three historical reasons for a right to keep and bear arms: the preference for a militia over a standing army, the deterrence of governmental oppression, and the right of personal defense. While the preference for a militia over the standing army is expressed elsewhere in Section 13, the interests underlying the right to keep and bear arms extend beyond that preference. The interests of “the sportsmen of this State” and the right to have arms for self-protection were cited as reasons for adopting the right to keep and bear arms in Virginia. See Proceedings & Debates of Virginia Senate Pertaining to Amendment of Constitution 393 (April 3, 1969) (Senator Long). The militia justification for empowering individuals to keep and bear arms has continued importance as well. In Virginia and other states during World War II, the armed citizenry were called upon to perform militia duties when the National Guard was called up for overseas duty. See Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 OKLA. CITY UNIV. L. REV. 177, 196-98, 233-35 (1982). They were expected to bring their own firearms. See *id.*

The scope of Virginia’s constitutional right to arms has not yet been directly addressed by this court.¹ While, ultimately, the meaning of the Virginia Constitution depends on its own text and framing history, the decisions of sister states, especially those with comparable constitutional text, may inform the analysis. State constitutional guarantees of the right to bear arms are found in Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. OF LAW & POLITICS 191 (2006).

The North Carolina Constitution has long guaranteed:

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; and as standing armies in time of peace are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to and governed by the civil power. Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the legislature from enacting penal statutes against said practice.

N.C. CONST. OF 1876, art. I, § 24 (now codified in substantially similar terms in Article I, § 30). The Supreme Court of North Carolina has

¹ The right has merely been alluded to in another context: fighting words are “no trivial matter in light of the tendency of many of our citizens to keep and bear arms.” *Crawford v. United Steelworkers, AFL-CIO*, 230 Va. 217, 239, 335 S.E.2d 828, 841 (1985) (Russell, J., dissenting with Carrico, C.J., and Stephenson, J., joining). *Cf.* Va. Atty. Gen. Opinion No. 05-078 (Jan. 4, 2006) (Art. I, § 13 “protects all citizens”).

held that this is an individual right and found two laws to infringe this right. See *State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921) (striking down pistol carrying license and bond requirement law as too restrictive); *Britt v. State*, 681 S.E.2d 320 (N.C. 2009) (ruling a felon in firearm possession statute unconstitutional as applied).

The Louisiana Constitution guaranteed: “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 abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed.”

LA. CONST. OF 1879, art. 3. Applying this, the Supreme Court of Louisiana said:

The constitutional right is to bear arms openly, so that when one meets an armed man there can be no mistake about the fact that he is armed. When we see a man with musket to shoulder, or carbine slung on back, or pistol belted to his side, or such like, he is bearing arms in the constitutional sense. Of course there are other examples. These are but illustrations.

State v. Bias, 37 La. Ann. 259, 260 (1885).

Tennessee’s constitution guarantees: “That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.” TENN. CONST. art. I, §

26. The Supreme Court of Tennessee, in striking down a pistol carrying statute as too restrictive, held that “the right to keep arms for this purpose involves the right to practice their use.... The right to keep arms necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair.”

Andrews v. State, 50 Tenn. 165, 178, 8 Am. Rep. 8, 13 (1871). The court also held that “the right to *keep* [arms], with all that is implied fairly as an incident to this right, is a private individual right, guaranteed to the citizen, not the soldier.” *Id.* at 182.² The Tennessee court later struck down an ordinance that prohibited carrying a pistol, ruling it too restrictive. *Glasscock v. City of Chattanooga*, 157 Tenn. 518, 11 S.W.2d 678 (1928).

The Arkansas Constitution guaranteed, “The citizens of this State shall have the right to keep and bear arms for their common defence.” ARK. CONST. art. II, § 5 (1868).³ The Supreme Court of Arkansas held a pistol-carrying statute too restrictive with this comment: “If cowardly and dishonorable men sometimes shoot

² *Andrews* was cited several times in *District of Columbia v. Heller*, 128 S.Ct. 2783, 2806, 2809, 2818 (2008).

³ This provision has since been slightly amended: a comma was added after “arms” and “defence” changed to “defense.”

unarmed men with army pistols or guns, the evil must be prevented by the penitentiary and gallows, and not by a general deprivation of a constitutional privilege.” *Wilson v. State*, 33 Ark. 557, 560, 34 Am.Rep. 52 (1878).

This court’s interpretation of the Constitution of Virginia need not be limited by the protections for the right to keep and bear arms conveyed by the Second Amendment as interpreted by the U.S. Supreme Court. *See, e.g., District of Columbia v. Heller*, 128 S. Ct. 2783, 171 L.Ed.2d 637 (2008). Rights guaranteed by the federal constitution are a floor, not a ceiling; a state may choose to provide greater protection to its citizens.

This was dramatically illustrated by *Opperman v. South Dakota*, 428 U.S. 364 (1976). There, the U.S. Supreme Court held that an inventory search of a motor vehicle does not violate the 4th and 14th Amendments. The case was remanded to the South Dakota Supreme Court, which was bound by the high court’s interpretation of the federal Constitution. However, the South Dakota Supreme Court was at liberty to interpret its state constitution independently. It did so, and held that an inventory search of a motor vehicle violates the

state constitutional guarantee against unreasonable searches and seizures. *State v. Opperman*, 247 N.W.2d 673 (S.D. 1976).

State courts have a tradition of using their independence to provide greater protection for individual rights. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Supreme Court agreed that a state's constitution may guarantee broader rights than the federal Constitution. This has occurred with the right to keep and bear arms pre-*Heller*, e.g., *State ex rel. City of Princeton v. Buckner*, 180 W.Va. 457, 377 S.E.2d 139 (1988) (striking down gun carrying law as too restrictive), and with other rights, e.g., *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003) (holding that limitation of civil marriage to individuals of opposite sexes lacked rational basis and violated state constitutional equal protection principles).

The restrictions under review sweep too broadly. They can be more narrowly tailored. For example, persons with a Concealed Handgun Permit could be exempted. They have already been scrutinized for their trustworthiness and ability to handle a firearm safely. See Va. Code § 18.2-308(D). Cf. *Students for Concealed*

Carry v. Regents of the University of Colorado, No. 09CA1230, 2010 WL 1492308 (Colo. App. April 15, 2010).

Once again, decisions from sister states provide guidance. Finding an arms law to sweep too broadly is not an uncommon occurrence. According to the Supreme Court of Oregon:

An “overbroad” law, as that term has been developed by the United States Supreme Court, is not vague, or need not be. Its vice is not failure to communicate. Its vice may be clarity. For a law is overbroad to the extent that it announces a prohibition that reaches conduct which may not be prohibited. A legislature can make a law as “broad” and inclusive as it chooses unless it reaches into constitutionally protected ground. The clearer an “overbroad” statute is, the harder it is to confine it by interpretation within its constitutionally permissible reach.

[An overbroad statute] impinges on some constitutionally protected right other than fair notice or “due process.” Unlike “vagueness,” the vice of “overbreadth” is not necessarily limited to penal laws, and to the extent that an overbroad law forbids what may not constitutionally be forbidden, it is invalid as such without regard to the facts in the individual case.

State v. Blocker, 291 Or. 255, 261, 630 P.2d 824, 827 (1981). The court found the arms law to be overbroad because it reached beyond permissible limits to impinge on a constitutionally protected right, namely, the right to bear arms. See *id.* at 261-62.

Answering a certified question, the Supreme Court of Appeals of West Virginia found that the language of the statute at issue

sweeps so broadly as to infringe a right that it cannot permissibly reach, in this case, the constitutional right of a person to keep and bear arms in defense of self, family, home and state, guaranteed by art. III, § 22. Accordingly, ... the statutory proscription against carrying a dangerous or deadly weapon, is overbroad and violative of article III, section 22 of the West Virginia Constitution....

Buckner, 180 W.Va. at 462, 377 S.E.2d at 144.

Holding a firearms ordinance unconstitutionally overbroad, the Supreme Court of Colorado stated:

A governmental purpose to control or prevent certain activities, which may be constitutionally subject to state or municipal regulation under the police power, may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.... Even though the governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.

City of Lakewood v. Pillow, 180 Colo. 20, 23, 501 P.2d 744, 745 (1972).

In determining the scope of Virginia's constitutional guarantee of the right to keep and bear arms, this court should rule that the regulation at issue is unconstitutionally overbroad, and not narrowly drawn to further the compelling state interest. As shown next, the same result is dictated by the Second Amendment as incorporated against the states. Nonetheless, the court may want to rest its

decision exclusively on the state constitution, and could also take this opportunity to make clear that Virginia's citizens enjoy greater protection for individual liberties than they enjoy under the federal Constitution.

II. The Constitution of the United States Protects Every American's Right to Keep and Bear Arms

A. The Second Amendment protects individual liberty from intrusion by federal, state, and local government

The Supreme Court of the United States, in *Heller*, recognized an individual right to keep and bear arms. See 128 S. Ct. 2783. Because the plaintiff in that case lived in the District of Columbia, a federal enclave, the Court did not decide whether this right restricts the actions of state and local governments. See *id.* at 2813, n.23.

The case for incorporating the Second Amendment through the Due Process Clause of the Fourteenth Amendment is straightforward and overwhelming. See, e.g., Brief for Respondents the National Rifle Association of America, Inc. Et Al. in Support of Petitioners, *McDonald v. Chicago*, 2009 WL 3844394 (U.S. Nov. 16, 2009) (No. 08-1521). By the time this court decides the instant case, the Supreme Court will have clarified whether the Second Amendment is incorporated in *McDonald*. Assuming the right is incorporated, the

critical question becomes the standard of review. As explained next, the proper standard of review for a fundamental right incorporated against the states is strict scrutiny.

Heller, as the panel noted, did not come out and flatly say that courts must apply “strict scrutiny” to laws that infringe upon the rights protected by the Second Amendment. But the *Heller* opinion creates no great mystery on this front. When a law interferes with “fundamental constitutional rights,” it is subject to “strict judicial scrutiny.” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16 (1973). See also *id.* at 17 (if a law “impinges upon a fundamental right explicitly or implicitly protected by the Constitution, [it] thereby requir[es] strict judicial scrutiny”); *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (“classifications affecting fundamental rights ... are given the most exacting scrutiny”); *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 n.14 (1985) (“As a general matter, governments are entitled to attack problems piecemeal, save where their policies implicate rights so fundamental that strict scrutiny must be applied.”); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 54 (1983) (“strict scrutiny [is] applied when government

action impinges upon a fundamental right protected by the Constitution”).

Heller clearly established that the Second Amendment secures a fundamental right, noting that Blackstone “cited the arms provision of the [English] Bill of Rights as one of the fundamental rights of Englishmen,” and that “[b]y the time of the founding, the right to have arms had become fundamental for English subjects.” 128 S. Ct. at 2798. See also *id.* at 2797 (“[T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that the pre-existing right ‘shall not be infringed.’”). Accordingly, regulatory burdens on the fundamental rights secured by the Second Amendment are subject to strict scrutiny.

Not only did the *Heller* Court reject application of rational basis review⁴, but it also definitively rejected Justice Breyer’s proposed

⁴ “Obviously, the [rational basis] test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms.” See *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938). (‘There may be narrower scope for operation of the presumption of constitutionality [*i.e.*, narrower than that provided by

“interest-balancing” approach. *See id.* at 2821. The Court concluded that the framers had done the relevant interest-balancing and had struck the balance in favor of protecting the preexisting right by including the Second Amendment in the Bill of Rights. For present purposes, what is critical is that the interest-balancing approach Justice Breyer advocated, and which the Court rejected, was a form of intermediate scrutiny. To be sure, the Court noted that Justice Breyer did not “explicitly at least” advocate one “of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis),” but a closer look at Justice Breyer’s dissent makes clear that he was advocating—implicitly at least—intermediate scrutiny. *See id.*

Justice Breyer denominated his test “interest-balancing,” rather than intermediate scrutiny, not because he was adopting a less demanding test, but because of his view that the government’s interest in regulating firearms would always be important or compelling. Thus, in Justice Breyer’s view, whether the standard of

rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . .’). If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws and would have no effect.” *Heller*, 128 S. Ct. at 2818 n.27

review were strict (compelling) or intermediate (important), the government interest would always be sufficient and application of the test would involve a search for the appropriate degree of fit, i.e., interest-balancing. See *id.* at 2851-52 (Breyer, J., dissenting) (“I would simply adopt such an interest-balancing approach explicitly.”). There is, however, no doubt that in defending his approach, he expressly linked it to the Court’s approach in interpreting other constitutional rights. In doing so he relied on tests expressly applying intermediate scrutiny. Indeed, Justice Breyer invoked First Amendment cases such as *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), and *Thompson v. Western States Medical Center*, 535 U.S. 357 (2002), which are undeniably intermediate scrutiny cases. See *Heller*, 128 S. Ct. at 2852 (Breyer, J., dissenting). Even more revealingly, Justice Breyer invoked *Burdick v. Takushi*, 504 U.S. 428 (1992). See *Heller*, 128 S. Ct. at 2852 (Breyer, J., dissenting). Not only does that case apply intermediate scrutiny, but it was the case on which the United States principally relied in advocating that the Court adopt intermediate scrutiny. See Brief of United States in *Heller* at 8, 24, 28. Thus, Justice Breyer’s interest-balancing test is nothing other than intermediate scrutiny and

the Court's rejection of his interest-balancing forecloses this Court from adopting intermediate scrutiny.

None of this is to suggest that the Supreme Court in *Heller* expressly adopted strict scrutiny as the appropriate methodology for reviewing Second Amendment challenges. The Court was explicit that it could resolve *Heller* and invalidate the challenged District of Columbia laws without definitively fixing a methodology for review.

As *Heller* states:

The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," ... would fail constitutional muster.

Heller, 128 S. Ct. at 2817-18.

But while *Heller* did not definitively fix the methodology for reviewing Second Amendment challenges, its rejection of both rational basis review and interest-balancing/intermediate scrutiny means that the debate that remains open is not between strict and intermediate scrutiny, but between strict scrutiny and the kind of *sui generis* approach applied in *Heller* that would eschew levels of

scrutiny entirely in favor of a more historically sensitive analysis. In this regard, it is noteworthy that the Chief Justice, who joined the *Heller* majority, expressly suggested at oral argument in *Heller* that the inquiry into levels of scrutiny was atextual and unhelpful. See *Heller* Transcript at 44.

To conclude that Second Amendment rights deserve some lesser protection than other fundamental constitutional rights is to conclude, contrary to what *is* explicit in *Heller*, that Second Amendment rights are not fundamental. And to apply a lesser standard of scrutiny to restrictions on this right than that which is applied to other fundamental rights is to conclude that these other rights somehow exist on a higher plateau than Second Amendment rights. But no constitutional right is “less ‘fundamental’ than” others, and there is “no principled basis on which to create a hierarchy of constitutional values” *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982). *Cf. Heller*, 128 S. Ct. at 2821 (“Like the First, [the Second Amendment] is the very *product* of an interest-balancing by the people And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding,

responsible citizens to use arms in defense of hearth and home.”).

“To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.” *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956).

B. The regulation at issue violates the Second Amendment

i. The regulation is not narrowly tailored

The *Heller* Court stated in dicta that “forbidding the carrying of firearms in sensitive places such as schools and government buildings” is a “presumptively lawful regulatory measure.” 128 S. Ct. at 2817. This reference was unnecessary to the holding of the case, and “cannot be read to relieve the government of its burden of justifying laws that restrict Second Amendment rights.” *United States v. Skoien*, 587 F.3d 803, 805 (7th Cir. 2009), *reh’g granted by United States v. Skoien*, No. 08-3770, 2010 WL 1267262 (7th Cir. Feb. 22, 2010). Moreover, it is clear that college buildings are not the kind of specialized government buildings, such as the Governor’s mansion or the state legislative chambers, to which the dictum refers. Nor is a college campus a school full of young children as the reference to schools presumably refers. Defendant’s Opening Brief describes in

detail the minors that may be present on campus, yet provides no evidence that this regulation is necessary to protect them. See Def. Open. Br. 9.

Defendant states that freshmen under the age of eighteen, elementary and high school summer campers, and minor children with their families, are often present in campus buildings and at special events. See *id.* at 9-10. Nowhere does Defendant explain why children are more likely to be present (or guns likely to be more dangerous) in these locations relative to areas like the public streets, sidewalks, and lawns of campus, where guns are currently allowed. Presumably, to get into these buildings and events, the children would have had to traverse some of the open areas of campus. This kind of loose decision to regulate one area but not another may suffice in most contexts, but not when strict scrutiny is used to evaluate the infringement of a fundamental right.⁵

The law is also overbroad and not narrowly tailored for the reasons explained, *supra*, in explaining that it fails to comply with the state constitution.

⁵ “When a plausible, less restrictive alternative is offered ... it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.” *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000).

ii. The regulation does not use the least restrictive means necessary to achieve the government's compelling purpose

In applying the strict scrutiny standard, “the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.”⁶ Clearly, the regulation at issue fails this test.

The Rector and Visitors of George Mason University could draft a regulation that serves the compelling governmental interest of public safety and general welfare, without infringing on law-abiding citizens' right to bear arms for self-defense. Rather than prohibiting open carry in certain areas of campus, the regulation could outlaw carrying a weapon for the purpose of menacing, threatening, or intimidating a specific person or group of people.

Defendant's Opening Brief lists a parade of horrors that may occur if the current regulation is held unconstitutional. See Def. Open. Br. 10. However, a regulation that includes an intent

⁶ *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 666 (2002). Different levels of scrutiny may apply to different rights claimed under the First and Second Amendments. Courts should consider challenges to the core right of self-defense the same way they evaluate content-based speech restrictions.

requirement would allow police to make an arrest or remove the individual from the area before violence or injury occurs.

Intent to menace can be inferred from the circumstances, as demonstrated by the examples given in Defendant's Opening Brief. *See id.* A rejected student applicant or expelled student who wears a visible sidearm to meet with a dean could be removed from the premises immediately, because it is reasonable to presume that he is carrying for the purpose of intimidating the dean. By contrast, it would not be reasonable to presume that a man waiting for his girlfriend in a building lobby, or quietly doing research in the library, has any intent to intimidate others or commit an act of violence.

Defendant's Opening Brief also states that a visible sidearm would "frighten students and minors such as preschoolers, [and] expose them to unnecessary risks such as an accidental discharge." *See id.* However, the possibility that others might be offended is not sufficient to justify the denial of a constitutional right. *See Playboy Entm't Group, Inc.*, 529 U.S. at 826-27 (striking down federal statute designed to keep sexually explicit material from children); *Texas v. Johnson*, 491 U.S. 397, 408-14 (1989) (holding a criminal conviction for flag desecration inconsistent with the First Amendment despite

onlookers' "serious offense"); *Cohen v. California*, 403 U.S. 15, 21-25 (1971) (overturning conviction for disturbing the peace by wearing a jacket bearing the words "Fuck the Draft" in a courthouse where women and children were present). Nor are these "students and minors" more likely to be scared of, or injured by, a gun in the library than one carried openly on campus streets and sidewalks. Furthermore, accidental gun discharges are exceedingly rare.⁷ The government has presented no evidence of the likelihood that a student or minor will be injured by an accidental discharge in campus buildings or events.

It is possible to draft a regulation that achieves the government's laudable public safety and educational goals, without infringing the right to bear arms. The current regulation does not pass constitutional muster, but it would be easy to write one that does.

⁷ See CENTERS FOR DISEASE CONTROL AND PREVENTION, NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, <http://webappa.cdc.gov/cgi-bin/broker.exe> (last visited April 23, 2010). In 2006 (the most recent data available), 154 children and teenagers (ages 0-19) were killed unintentionally by firearms, compared to 6,642 killed unintentionally in motor vehicle traffic. Children and teenagers were thus 43 times more likely to die from a motor vehicle accident than from a gun accident.

iii. The regulation may in fact be counterproductive to achieving the government's goal of increased public safety

Besides being overly restrictive, the regulation may actually decrease public safety by creating gun-free zones. Schools have become attractive targets for mentally disturbed belligerents, largely because they can be confident of defenseless victims. College campuses and individual buildings generally do not have controlled points of entry, metal detectors, or X-ray machines. An armed madman with no regard for gun laws may enter undetected, knowing that law-abiding people have left their weapons at home.

More than half of all school shootings end before law enforcement responds to the scene, despite their often prompt response. See PREVENTING SCHOOL SHOOTINGS: A SUMMARY OF A U.S. SECRET SERVICE SAFE SCHOOL INITIATIVE REPORT, *available at* <http://www.ncjrs.gov/pdffiles1/jr000248c.pdf> (last visited April 22, 2010). Responsible armed citizens in schools could respond quickly and effectively to end a shooter's rampage.

Peter Odighizuwa opened fire on faculty and students of Appalachian School of Law in Grundy, Virginia on January 16, 2002. A fellow student, Mikael Gross, was walking back to the law school

after lunch when he heard a gunshot. See Diane Suchetka, *Ex-Charlottean: I Helped Nab Suspect; Scene “Looked Like Somebody Had Mopped the Floor With Blood,”* CHARLOTTE OBSERVER (North Carolina), January 18, 2002, at 2A. He ran to his car parked 100 yards away and retrieved his gun from under the front seat. See *id.* Tracy Bridges was in class when the shooting started, and he too ran to retrieve a pistol from his truck. Rex Bowman, *“I Was Sick. I Need Help”*; *Shocked Town Still Grasps for Answers*, RICHMOND TIMES DISPATCH (Virginia), January 18, 2002, at A1. Gross and Bridges pointed their guns at the shooter and ordered him to drop his gun, which he did, before being tackled by two other students. See Suchetka; Bowman. Thanks to the students’ quick thinking and heroism, the shooter was subdued without further bloodshed.

Teenager Luke Woodham opened fire on Pearl High School in Pearl, Mississippi on October 1, 1997. He killed two students and wounded seven others. Woodham ran to his car when he heard sirens, intending to drive to Pearl Junior High School and shoot more children before police could arrive. See Wayne Laugesen, *A principal and his gun*, BOULDER WEEKLY (Colorado), Oct. 15, 1999, available at <http://www.davekopel.com/2a/othwr/principal&gun.htm> (last visited

April 22, 2010). His plan was thwarted by Assistant Principal Joel Myrick, who ran to his truck to retrieve his gun the moment he heard the first shots fired. *See id.* He intercepted Woodham and held him at gunpoint until police arrived. *See id.* It is not a stretch to say that the school assistant principal saved many lives that day by preventing Woodham from reaching the junior high school or having a standoff with police. *See id.*

While legislators and school officials have the best of intentions, policies mandating gun-free zones on campus leave their communities vulnerable. Maniacs intent on killing as many people as possible are likely to choose a target-rich environment where victims will be unable to defend themselves. Allowing law-abiding individuals to choose an effective means of self-defense, and publicizing this change to the regulation, could make this kind of tragedy less likely.

CONCLUSION

For the reasons stated in this brief, the judgment of the circuit court should be reversed.

Respectfully submitted,

Robert Dowlut

Lindsay K Charles

Attorneys for Amicus Curiae
National Rifle Association
11250 Waples Mill Road
Fairfax, Virginia 22030-9400
Telephone: (703) 267-1254
Facsimile: (703) 267-3985

CERTIFICATE

There has been compliance with Rule 5:26(d), and I hereby certify that on the day of May, 2010, I mailed 3 copies of the foregoing amicus curiae brief by first class mail to:

Rudolph DiGiacinto
8344 Darlington Ct.
Springfield, VA 22152
Appellant Pro Se

E. Duncan Getchell
Office of the Attorney General
900 East Main Street
Richmond, VA 23219
Appellee's Counsel

Robert Dowlut
National Rifle Association
11250 Waples Mill Road
Fairfax, Virginia 22030-9400
Telephone: (703) 267-1254
Facsimile: (703) 267-3985
E-mail: rdowlut@nrahq.org