

regulation 8VAC35-60-20. *Complaint* ¶¶ 2, 9-12. This regulation per counts I-III, *Complaint* ¶¶ 13-39, violates Mr. DiGiacinto’s constitutional and statutory rights to openly carry a handgun.

ARGUMENT

I. Violation of Constitutional Rights Including Va. Const. Art. I, § 13; U.S. Const. amend II; U.S. Const. amend XIV. (Count I).

“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...what divine providence has given to every individual – the means of self-defence.” Statement of Colonel George Mason (June 14, 1788) in 3 *The Papers of George Mason*, at 1075-1076 (Robert A. Rutland ed. 1970).

Private adventurers styled as the Virginia Company 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 1607.¹ The Third Charter of the Virginia Company is quite informative and directed that those coming to Virginia to be heavily armed including: “armour, weapons, ordinance, munition, powder, shot...for their use and defence”.² Despite the long tradition and history in Virginia of the private keeping and bearing of all types of arms, there is no known direct case law on Va. Const. Art. I, § 13.

This constitutional provision demands 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. The term “people” in the Bill of Rights refers to individuals. *District of Columbia v. Heller*, 128 S. Ct., 2783, 2790-2791 (2008). The phrase “the right of the people to keep and bear arms shall not be

¹ *The Jamestown Adventure: Accounts of the Virginia Colony, 1605-1614*, IX-X (Ed Southern ed. 2004).

² *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).

infringed” merely restates the natural right of self-defense, self-preservation and is the last bulwark against the maladministration and the lawless usurpation of the government against the liberties of the people. Va. Const. Art. I, §§1-3; *Heller*, 128 S. Ct. at 2801-2802; Colonel 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); 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)(“The Right of Bearing Arms... is among the most valuable privileges, since it furnishes the means of resisting as a freeman ought, the inroads of usurpation.”).

The Proper Level Of Scrutiny

Va. Const. Art. I, § 13 is a self-executing constitutional provision. *Gray v. Virginia Secretary of Transportation*, 276 Va. 93, 106, 662 S.E.2d 66, 73 (2008); *City of Boerne v. Flores, Archbishop of San Antonio, et al.*, 521 U.S. 507, 524 (1997)(“As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing.”). The General Assembly or its agents may only legislate to further enhance or to enforce a self-executing constitutional provision. 16 C.J.S. *Constitutional Law* § 91 (2005); 16 Am. Jur. 2d *Constitutional Law* § 101 (2008); *Opinion of the Justices No. 94*, 252 Ala. 199, 202, 40 So.2d 330, 333 (1949)(“[n]o legislation may restrict or alter a self-executing constitutional provision.”).

The individual right to keep and bear arms is a fundamental right in Virginia as it is “explicitly or implicitly guaranteed by the Constitution” and requires strict judicial scrutiny. “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*

v. Commonwealth, 228 Va. 213, 216, 321 S.E.2d 284, 286 (1984); *San Antonio School District v. Rodriguez*, 411 U.S. 1, 16-17 (1973); 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.”). “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). “Prohibitory provisions in a constitution are self-executing to the extent anything done in violation of them is void”. 16 Am. Jur. 2d Constitutional Law § 105 (2008).

A History of Bearing Arms at Colleges in the Commonwealth

The *Amicus Curiae* brief of Virginia1774.org in *Heller*, 128 S. Ct., WL477091 (2008)³ gave an extensive but not an exhaustive history of the right to keep and bear arms in Virginia.

By the following Thursday six hundred troops were in town, including students from the College of William and Mary, who formed a company under their president, the Reverend James Madison, a cousin of the latter United States president. [Thomas] Nelson reviewed his forces on the college green and pronounced himself “much satisfied” with their appearance. The overall response to the emergency was impressive. Some militia marched forty miles in twenty-four hours to reach their posts. At the end of August about one thousand were encamped around Williamsburg and on the peninsula. John E. Selby, *The Revolution in Virginia 1775-1783*, 133-134 (1988). Once more in command, Thomas Nelson had to keep his troops scattered because he did not know the British intentions. Worse, the militia had weapons enough for only every third or fourth man. The volunteer cavalry responded especially well. The student company at the College of William and Mary rode swiftly to Smithfield, and the corps under the general’s brother, Hugh Nelson, received compliments for its performance. *Id.* at 207.

Thomas Jefferson advised his nephew Peter Carr on various studies and habits to help Peter as a student at the College of William and Mary in 1785⁴. Jefferson wrote: “[c]onsider what

³ Also available at: http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_RespondentAmCuVirginia1774new.pdf

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 Thomas Jefferson*, 407 (Julian P. Boyd ed. 1953). Jefferson would again write to Peter Carr concerning college education on Sept. 7, 1814. “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.” John C. Henderson, *Thomas Jefferson’s Views on Public Education*, 203 (1890).

Colonel Thomas Jefferson as the County Lieutenant and Chief Commanding Officer of the Militia for Albemarle County, was quite familiar with the military exercise.⁵ Thomas Jefferson as the founder of the University of Virginia⁶ mused on the gymnastics of the students at UVA expanding upon what he had written earlier to his nephew Peter Carr.

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

⁴ *The History of the College of William and Mary from its Foundation, 1660, to 1874.*, (Catalogue of Alumni, 1785-1790), 98 (Richmond 1874).

⁵ Military Commission of Thomas Jefferson, June 10, 1770: <http://www.virginia1774.org/TJCommission.html>

⁶ George Mason University was previously a division of UVA. See Va. Code § 23-91.25.

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).

“In 1848 thirty muskets were issued to the trustees [Front Royal Academy], for the instruction of the pupils in military exercises...It [Fleetwood Academy] was issued 40 muskets by the State in 1848 for the instruction of the pupils in military exercises.” Alfred J. Morrison, *The Beginnings of Public Education in Virginia, 1776-1860*, 164-165 (1917).

The Commonwealth of Virginia from its inception has placed a high regard for firearms and military training at its colleges and its students and professors⁷ have served to defend this Commonwealth in battle. The Virginia Military Institute was established in 1839⁸ and has been associated with some of the greatest fighting generals in history including General George S. Patton Jr.⁹ and General Thomas “Stonewall” Jackson. Stonewall Jackson surveyed the field during the Battle of Chancellorsville and seeing so many former VMI students and colleagues, exclaimed: “The Institute will be heard from today.”¹⁰ In 1864 the VMI student body was ordered out from the school and engaged the enemy charging through withering enemy artillery

⁷ College of William & Mary Law Professor St. George Tucker (Virginia Militia, Battle of Guilford Courthouse, Yorktown) Charles W. Coleman Jr., *The Southern Campaign, 1781, Guilford Courthouse to the Siege of Yorktown, Narrated in the Letters of St. George Tucker to his Wife*, in *7 The Magazine of American History*, 36-46 & 201-216 (1881); U.S. Chief Justice John Marshall, College of William & Mary Student (Fauquier County Independent Company, Culpeper County Minute Men, Battle of Great Bridge, Daniel Morgan’s Rifle Company) *10 American Statesman, The Constructive Period, John Marshall*, 9-24 (John T. Morse ed. 1894).

⁸ *United States v. Virginia et al.*, 518 U.S. 515, 520 (1996).

⁹ Martin Blumenson, *Patton, The Man Behind the Legend, 1885-1945*, 42-43 (1994).

¹⁰ Jennings C. Wise, *The Military History of the Virginia Military Institute, From 1839 to 1865*, 218 (Lynchburg 1915).

and rifle fire to defend the Commonwealth during the Battle of New Market. They were victorious in battle and received the praise of the Commanding General.¹¹

The quotation in *Heller*, 128 S. Ct. at 2816-2817, that the opinion “should not cast doubt on long standing...laws forbidding the carrying of firearms in sensitive places such as schools” is *obiter dicta* and “dicta cannot serve as a source of binding authority in American Jurisprudence”. *Newman v. Newman*, 42 Va. App. 557, 565-566, 593 S.E.2d 533, 537-538 (2004)(quoting many sources). GMU’s regulation is not long standing and under the rule of statutory construction, *expressio unius est exclusio alterius*, a college or university is not a school as defined under Va. Code § 18.2-308.1. See also Va. Const. Art. VIII, § 9. *Cf.* § 1. The General Assembly under Virginia codes § 18.2-308.1(B) and § 22.1-277.07(D)&(F) did not create a total prohibition of firearms at K-12 schools. The contrast of these laws allowing school age children around firearms versus the GMU regulation prohibiting draft age males from keeping and bearing arms could not be more apparent.

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.

The history of colleges in the Commonwealth is the history of great warriors and students “trained to arms” as the Constitution commands.

¹¹ *Id.* at 335.

The Right and Duty to Be at All Times Armed

Full citizens of Virginia have always been able to defend themselves with arms¹² and civilly or militarily required to come to the aid of the community in time of need. *An act for restraining and punishing of Pirates and Privateers* (April 1699), Va. Stat. at Large, 3 Hening 176-179 (1823) (“That if any pirates...shall land and put on shoar...all officers civil and military are hereby required and impowered to raise and levy such a number of well armed men as he or they shall judge necessary for the seizing, apprehending and carrying to goal [jail] of all and every such persons...”).¹³ The Accomack County court commanded that twenty armed citizens guard the accused under the authority of the Common law *posse comitatus*. *Uzzle v. Commonwealth*, 107 Va. 919, 925, 60 S.E. 52, 54 (1908); *South v. Maryland*, 59 U.S. (18 How.) 396, 402 (1855) (“[t]he *posse comitatus* or power of the county... everyone over the age of fifteen years is bound to obey under pain of fine and imprisonment.”). Secretary of State James Madison wrote: “Should any aid be necessary, you will call for the assistance of the good citizens of the district as the *posse comitatus* or civil power of the territory.” *Livingston v. Dorgenois*, 11 U.S. 577, 579 (1813). See also Va. Code § 18.2-463. Thomas Jefferson illuminated the rights under the various state constitutions including Virginia and wrote in a letter: “that it is their right and duty to be at all times armed.” Letter of Thomas Jefferson to Major John Cartwright (June 5, 1824) *Amicus, supra* at 29.

As to the protection of our own frontiers, it would seem best to leave it to the people themselves, as hath ever been the case, and if at any time the frontier men should be too hard pressed, they may be assisted by the midland militia. This will always secure to us a hardy set of men on the frontiers, used to arms, and ready to assist against invasions on other parts. Whereas, if they are

¹² *Amicus, supra* at 10-11.

¹³ “March 1719 saw 13 pirates meet their end on the gallows along Williamsburg’s present Capitol Landing Road.” Yetter, *When Blackbeard Scourged the Seas*, 15 *Colonial Williamsburg Journal*, No. 1., 22-28 (Autumn 1992).

protected by regulars, security will necessarily produce inattention to arms, and the whole of our people becoming disused to War, render the Curse of a standing army Necessary. Letter of Richard Henry Lee to James Monroe (Jan. 5, 1784), *Amicus, supra* at 17.

The Militia

GMU's regulation does not gain public safety, but undermines the security of a free state by weakening the militia through disarmament, and removing the "martial spirit"¹⁴ to defend our Commonwealth or its citizens at a moments notice. Militia service was compulsory in the Colony of Virginia with the arms supplied by the individual. *Amicus, supra* at 6-7. "That it is the duty of citizens by force of arms to defend our government against all enemies whenever necessity arises is a fundamental principle of the Constitution...it declares that, 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." *United States v. Schwimmer*, 279 U.S. 644, 650 (1929)(Overturned it part by *Girouard v. United States*, 328 U.S. 61 (1946) to allow for conscientious objectors to become naturalized citizens. The passage is cited solely for *Schwimmer's* recognition of the immutable law of societal preservation in a free state under Va. Const. Art. I, § 13.) See also *Heller*, 128 S. Ct. at 2800-2801; *Burroughs v. Peyton*, 57 Va. (16 Gratt), 470, 482 (1864)("A well regulated militia has always been regarded as necessary to the security of a free state."). "Arms, ammunition and equipment of militia are privileged." Henry St. George Tucker, *2 Commentaries on the Laws of Virginia Comprising the Substance of A Course of Lectures Delivered to The Winchester Law School*, 360-361 (Winchester 1836).

¹⁴ *Remarks on Annual Elections for the Fairfax Independent Company, supra* at 229.

“I ask who are the militia? They consist now of the whole people...” Statement of Colonel George Mason (June 16, 1788), *Amicus, supra* at 15. “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. “[t]heir governor, constitutionally the commander of the militia of the state, that is to say, of every man in it able to bear arms...always in readiness...” Letter of Thomas Jefferson to Destutt de Tracy (Jan. 26, 1811), *Amicus, supra* at 7; *Heller*, 128 S. Ct. at 2799.

Being familiar with firearms and trained in their use, especially in the military exercise as Colonel George Mason wrote,¹⁵ and being “always in readiness” saves lives. “This difference [between British and American casualties] is ascribed to our superiority in taking aim when we fire; every soldier in our army having been intimate with his gun from his infancy.” Letter of Thomas Jefferson (June 8, 1778), in 1 *The Life and Letters of Thomas Jefferson*, 208 (Henry A. Washington ed. 1858). As stated in *Schwimmer*, 279 U.S. at 650, having arms encourages men to fight for their country. “I entreat you Sir to order them to be furnished with good Musquets & Bayonets &c. It is a most discouraging circumstance to a young-fellow to lead Men into Action, without proper Arms.” Letter of Colonel George Mason to Thomas Jefferson (Oct. 6, 1780) in 2 *The Papers of George Mason*, 675-676 (Robert A. Rutland ed. 1970). Va. Const. Art. I, § 13 is the proper constitutional means of acquiring safety and security of the community. “Soon he [Governor Gooch] was expressing the hope that by instilling discipline and deference the adjutant would work a general social improvement: ‘The ordinary people want a good deal of polishing and on that account these regular [militia] Exercises will be of great benefit to the country’.” Rhys Issac, *The Transformation of Virginia, 1740-1790*, 110 (1999). GMU’s

¹⁵ Colonel George Mason, *Fairfax County Militia Association*, in 1 *The Papers of George Mason*, 210-211 (Robert A. Rutland ed. 1970).

regulation is but a subterfuge to that natural safety and security of the Commonwealth and only serves to disarm the people and therefore the militia.

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, supra* at 1074-1075.

“None but an armed nation can dispense with a standing army; to keep ours armed and disciplined, is therefore at all times important, but especially so at a moment when rights the most essential to our welfare have been violated.” Letter of Thomas Jefferson Requesting Militia Returns, Arms and Accoutrements (February 25, 1803) in 4 *The Writings of Thomas Jefferson*, 469 (Henry A. Washington ed. 1854).

A Fundamental Individual Right Outside of the Place of Abode

The early 19th Century decisions of our sister states held their constitutions protected the right to keep and bear arms outside of the home. *Heller*, 128 S. Ct. at 2809 (quoting *Nunn v. State*, 1 Ga. 243, 251 (1846). Georgia Supreme Court striking down a ban on carrying pistols openly. *State v. Chandler*, 5 La. Ann. 489, 490 (1850). Louisiana Supreme Court held that citizens had a right to carry arms openly.). See also *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 92 (1822)(Kentucky Supreme Court striking down a concealed carry law stating: “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.”).

In 1643 the Virginia counties of Accomack-Northampton ordered that no person should travel from house to house without a gun. *Amicus, supra* at 6. “To the courthouse six miles north, however, [Patrick] Henry generally walked, ‘carrying his gun and hunting along the way’. He would appear at the bar in his short hunting jacket and greasy leather breaches and between cases make plans for longer expeditions.” Henry Mayer, *A Son of Thunder: Patrick Henry and the American Republic*, 102 (1991). “[a] man no more thinks of going out of his house on any occasion, without his rifle or musket in his hand, than a European fine gentleman without his sword by his side.” St. George Tucker, *Amicus, supra* at 31. “[i]t is the general custom of the inhabitants, when going about the neighborhood from house to house, to travel on foot and to carry their guns with them.” *M’Cune v. Commonwealth*, 41 Va. (2 Rob) 771, 780 (1843). Bearing arms outside the place of abode in Virginia has been a right and duty since the founding of Jamestown and when the General Assembly commanded in 1623: “That no man go or send abroad without a sufficient party well armed.” & “That men go not to worke in the ground without their arms.” *Amicus, supra* at 5.

Colonel George Mason formed the first Independent Company of Volunteers in Virginia in September of 1774 to defend the Constitution and the County of Fairfax.¹⁶ In 1775 when Royal Governor Lord Dunmore removed the gunpowder from the magazine in Williamsburg, Captain Patrick Henry and the Hanover Independent Company marched toward the Capital to retrieve the gunpowder. “You may in vain mention to them the duties upon tea, etc. These things, they will say, do not affect them. But tell them of the robbery of the magazine, and that the next step will be to disarm them, and they will be then ready to fly to arms to defend themselves.” Statement of Patrick Henry, *Amicus, supra* at 25. United States Chief Justice John Marshall

¹⁶ *Fairfax County Militia Plan for Embodying the People*, (February 1775) in 1 *The Papers of George Mason*, 215-216 (Robert A. Rutland ed. 1970).

helped to organize the Fauquier County Independent Company of Volunteers and served as its Lieutenant. He gathered his men to tell them of Patrick Henry's actions and that they should prepare themselves to defend their rights and liberties and be ready to go to the front at a moments notice.¹⁷ These actions by armed citizens outside of the home drove Lord Dunmore out of Virginia and enabled Virginia to declare her independence from Great Britain. *Amicus, supra* at 26.

A public university's lands "are public property... it is governed and controlled solely by the State; 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, 222-223, 591 S.E.2d 72, 75 (2004); Va. Const. Art. VIII, § 9. See also *Chicago v. Morales*, 527 U.S. 41, 54 (1999)(An individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is a part of our heritage.). The *ratio decidendi* of *Heller*, 128 S. Ct. at 2817-2818, necessarily held that a handgun is not a "dangerous or unusual weapon" and therefore it is also a protected arm outside of the place of abode.

The Right and "Means of Self-Defence"

"The right of self-defence is the first law of nature." St. George Tucker, *Amicus, supra* at 18. GMU has no authority over "the means of self-defence" that facilitate Mr. DiGiacinto's right to life, liberty, and safety. Va. Const. Art. I, § 13; Va. Const. Art. I, § 1; *Richmond F & P. Railroad Co. v. City of Richmond*, 145 Va. 225, 238 133 S.E. 800, 803 (1926)("Man as an individual possesses certain rights which are called inherent rights, inborn and inbred, the gift of the Maker, and essential to his existence and well being...and are not surrendered by entering into organized society. They existed before society was organized..."); *Crenshaw v. Slate River*

¹⁷ 10 American Statesman, *The Constructive Period*, John Marshall, *supra* at 9-12.

Co., 27 Va. (6 Rand.) 245, 276-277 (1828)(“Liberty itself consists essentially, as well in the security of private property, as of the persons of individuals”); *Parrish v. Commonwealth*, 81 Va. 1, 12 (1884)(quoting Sir Matthew Hale, See *Amicus*, *supra* 35-36); *Heller*, 128 S. Ct. at 2805 (“St. George Tucker’s version of Blackstone’s Commentaries...conceived of the Blackstonian arms right as necessary for self-defense.”); *Id.* at 2801 (“Justice Breyer’s assertion that individual self-defense is merely a “subsidiary interest” of the right to keep and bear arms, see post, at 2841, is profoundly mistaken...it was the central component of the right itself.”).

The General Assembly allows **felons** to possess weapons including firearms under Va. Code § 18.2-308.2. Law enforcement officers who are convicted felons may possess firearms during the performance of their official duties through the exemptions under § 18.2-308.2(B). The Virginia Court of Appeals explained that Va. Code § 18.2-308.2 allowed felons to use firearms for self-defense apart from the listed exemptions. *Humphrey v. Commonwealth*, 37 Va. App. 36, 48, 553 S.E.2d 546, 552 (2001)(“The legislature in enacting criminal statutes legislates against a background of Anglo Saxon common law...Part of this common law is the doctrine of self-defense...We do not believe that the legislature intended to make convicted felons hapless targets for assassins. The right to defend oneself from deadly attack is fundamental. The legislature did not contemplate that Code § 18.2-308.2 would divest convicted felons of that right.”).

GMU’s regulation under 8VAC35-60-20 and Va. Code § 18.2-308.2(B) permits a convicted “police officer” who has committed a great crime against society to be armed, while the people themselves as law-abiding citizens are disarmed by the same regulation. These acts of the Commonwealth are *mala in se* and are a direct violation to the purposes for which the Commonwealth was formed by placing felons in positions of trust to execute the laws of the

Commonwealth over and above the natural rights of the people.¹⁸ Va. Const. Art. I, §§1-3, & 13. Tyranny and not Narrowly Tailored is its rightful name for there is no rational basis for evil in a free and just republic. “[w]e shall no longer be surprised that free-born man hath been enslaved, and that those very means which were contrived for his preservation have been perverted to his ruin; or, to borrow a metaphor from Holy Writ, that the kid hath been seethed in his mother’s milk.” Colonel George Mason, *Remarks on Annual Elections for the Fairfax Independent Company, supra* at 230.

In a similar circumstance, the U.S. Supreme Court struck down those provisions of the District’s ordinance that did not allow a citizen’s handgun to be always in readiness for self-defense and only exempted “police officers” from the prohibition. *Heller*, 128 S. Ct. at 2818-2822.

The Doctrine of Co-extensive Protections

Virginia courts recognize the doctrine of co-extensive protections. “Our courts have consistently held that the protections afforded under the Virginia Constitution are co-extensive with those in the United States Constitution...Both guarantee to the citizen certain inherent rights, and, in our opinion, if the act violates the Federal Constitution it also will violate the Virginia Constitution.” *Marshall et al.*, 275 Va. 419, at 428; *Paris v. Commonwealth*, 35 Va. App. 377, 381, 383, 545 S.E.2d 557, 559-560 (2001); *Henry v. Commonwealth*, 32 Va. App. 547, 551, 529 S.E.2d 796, 798 (2000); *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

¹⁸ “That such Precedents are of the most dangerous & fatal Tendency; sapping the Foundations of the Commonwealth, and the Rights & Libertys of the People...that they have enfeebled or frustrated our whole System of Penal-Laws...These are some of the fatal consequences of the tender-Laws; which loudly call for their Repeal...upon the Principles of Equity & Justice.” *A Petition and Remonstrance from the Freeholders of Prince William County* (Dec. 10, 1781) in 2 *The Papers of George Mason*, 703-711 (Robert A. Rutland ed. 1970).

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.”). This doctrine as plainly recognized in *Aldridge* and the other listed cases *supra* enforces the U.S. Const. amend. II., against the Commonwealth and its agencies.

“That the right to keep and bear arms guaranteed by the second amendment to the Constitution of the United States and which is an inalienable part of our citizens’ heritage in this State shall not be infringed.” H.J.R. No. 21 (1964), *Amicus, supra* at 32-33. “We start therefore with a strong presumption that the Second Amendment right is exercised individually and ***belongs to all Americans***”. *Heller*, 128 S. Ct. at 2791. See also *Planned Parenthood of Southeastern Pennsylvania et al. v. Casey, Governor of Pennsylvania, et al.*, 505 U.S. 833, 846-851 (1992)(Modern Fourteenth Amendment Incorporation Doctrine).

There is no doubt that regulation 8VAC35-60-20 is unconstitutional and violates Mr. DiGiacinto’s right to keep and bear arms openly under the Virginia Constitution Art. I, § 13. It also violates his rights under the U. S. Const. amend. II. “[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 v. Roanoke*, 179 Va. 47, 50, 18 S.E.2d 287, 288 (1941). “[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). “A constitutional guarantee subject to future judges’ assessments of its usefulness is no

constitutional guarantee at all. *Heller*, 128 S. Ct. at 2821.

“Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses...As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. 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, 428-429 (1956).

“These Rights have not been forfeited by any Act of ours, we can not be deprived of them without our Consent, but by Violence & Injustice; We have received them from our Ancestors and, with God’s Leave, we will transmit them, unimpaired to our Posterity.” Colonel George Mason (June 6, 1766) *To The Committee of Merchants in London*, in 1 *The Papers of George Mason*, 70-71 (Robert A. Rutland ed. 1970).

II. No Authority to Regulate Handguns Openly Carried Or To Maintain Regulations Inconsistent with State Law (Counts II & III)

Count II as it relates to the open or “unconcealed” carry of a handgun is properly before this court as it was preserved in Count II (*Complaint* ¶¶ 25-27) and was not dismissed by the *Order* of April 27, 2009. It is an established principle of constitutional law that a court will not rule upon the constitutionality of a statute unless such a determination is absolutely necessary to decide the merits of the case. *Marshall et al.*, 275 Va. 419, at 428.

Va. Const. Art. I, § 14 is a self-executing constitutional provision. *Gray*, 276 Va. 93, at 106. When any branch of government or agency transcends its powers or authority, it violates Va. Const. Art. I, § 14. *Kemper v. Hawkins*, 3 Va. (1 Va. Cases) 20, 40-41(1793).

I have heard of an English chancellor who said, and it was nobly said, that it was his duty to protect the rights of the subject, against the encroachments of the crown; and that he would do it, at every hazard. But if it was his duty to protect a solitary individual against the rapacity of the sovereign, surely, it is equally mine, to protect one branch of the legislature, and consequently, the

whole community, against the usurpations of the other: and whenever the proper occasion occurs, I shall feel the duty; and fearlessly perform it. Whenever traitors shall be fairly convicted by the verdict of their peers, before the competent tribunal, if one branch of the legislature, without the concurrence of the other, shall attempt to rescue the offenders from the sentence of the law, I shall not hesitate sitting in this place to say to the general court. *Fiat justitia, ruat caelum*; and, to the usurping branch of the legislature, you attempt worse than a vain thing; for although you cannot succeed, you set an example which may convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overleap the bounds prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and pointing to the constitution, will say to them, here is the limit of your authority; and hither, shall you go, but no further. Judge George Wythe. *Commonwealth v. Caton & al.*, 8 Va. (4 Call) 5, 8 (1782).

“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). Administrative agencies or instrumentalities in the exercise of their powers, may validly act only within the authority conferred upon them by the **Constitution** or statutes vesting power in them. *Sydnor Pump & Well Co. v. Taylor*, 201 Va. 311, 316, 110 S.E.2d 525, 529 (1959); *Safeway Stores v. Milk Commission*, 197 Va. 69, 77, 87 S.E.2d 769, 774 (1955); *City of Portsmouth v. Virginia Ry. & Power Co.*, 141 Va. 54, 61, 126 S.E. 362, 364 (1925); *Ellinger v. Commonwealth*, 102 Va. 100, 105-106, 45 S.E. 807, 808 (1903).

GMU has not been given either explicit or implied power by the General Assembly to regulate handguns openly carried and Va. Code § 23-91.24 mandates that GMU: “[s]hall be subject at all times to the control of the General Assembly.” See *Phillips v. Rector and Visitors of Univ. of Va.*, 97 Va. 472, 475, 34 S.E. 66, 67 (1899); Va. Const. Art. VIII, § 9. The Constitution of Virginia vests the legislative power in the General Assembly under Art. IV, § 1. *Gray*, 276 Va. 93, at 105-106. The 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. 47, at 50-51. 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, 309-310 (2002); *Andrews v. Board of Supervisors*, 200 Va. 637, 641, 107 S.E.2d 445, 448 (1959).

A regulation must have constitutional or statutory authority to have the force of law. *Carbaugh v. Solem*, 225 Va. 310, 314, 302 S.E.2d 33, 35 (1983); *Michigan Cent. R. Co. v. Vreeland*, 227 U.S. 59, 66-67 (1913)(The police power is subordinate to the constitution and the legislature.). GMU’s regulation is an *ultra vires* act and *void ab initio*. Op. Va. Att’y Gen. No. 08-43 (2008)(“A person’s right to carry a firearm openly is considered universal within the Commonwealth...the Department’s enabling legislation does not specifically authorize a prohibition against the open carry of firearms”); *Heller*, 128 S. Ct. at 2797(“The Second Amendment, like the First...codified a pre-existing right...this is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence.”).

Count III

Count III is properly before this court in regards to the open carry of firearms and was preserved (*Complaint* ¶¶ 31-34, 36-39) and not dismissed by the ***Order*** of April 27, 2009. The General Assembly has expressly declared in Va. Code § 23-91.29(a): “The board of visitors [GMU] 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.” This code mirrors the command of Va. Code § 1-248. Va. Code § 55-

248.9(A)(6) prevents GMU as a provider of public housing¹⁹ from prohibiting firearms in their applicable public housing as a condition of tenancy. This would allow Mr. DiGiacinto to enter a public housing unit if invited by the tenant who themselves may lawfully possess firearms.

GMU's regulation must comply with the will of the General Assembly expressed in applicable statutory law on firearms. *University of Utah v. Shurtleff*, 144 P.3d 1109, 1121 (Utah 2006); Op. Va. Att'y Gen. No. 08-43 (2008) ("It is within the sole discretion of the General Assembly to limit the carrying of firearms...beyond that restricted by § 18.2-287.4.").

There is no doubt that GMU has no authority to regulate handguns openly carried by Mr. DiGiacinto or to promulgate and maintain a regulation inconsistent with state law. "[I]t is obvious that GMU is not 'purely an administrative agency'. 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). The proper education of those students is to be trained to arms in the military exercises as commanded by Va. Const. Art. I, § 13.

CONCLUSION

WHEREFORE, Plaintiff, Rudolph DiGiacinto, for the reasons cited above, prays that he have judgment against Defendant, The Rector and Visitors of George Mason University.

Respectfully Submitted,

By: _____
Rudolph DiGiacinto, *pro se*

¹⁹ <http://housing.gmu.edu/general/areas/> (As visited June 6, 2009).

