IN THE
SUPREME COURT OF VIRGINIA

RUDOLPH DIGIACINTO

Appellant,

v.

THE RECTOR AND VISITORS OF GEORGE MASON UNIVERSITY

Appellee.

PETITION FOR APPEAL
From the Circuit Court of Fairfax County

BRIEF OF RUDOLPH DIGIACINTO

Rudolph DiGiacinto
Pro Se

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STATEMENT OF THE NATURE OF THE CASE

Mr. DiGiacinto filed suit in Fairfax County Circuit Court requesting declaratory and injunctive relief against GMU'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. (*Bill of Complaint,* Count I*,* ¶¶ 1, 13-24.) Mr. DiGiacinto also challenged whether GMU had the authority to promulgate the regulation or to maintain it when it is inconsistent with state law (*Complaint,* Counts II-III, ¶¶ 25-39). 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. 3rd 439, 459 (9th 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) 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 unconcealed 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. (*Bill of Complaint,* ¶ 2).

The Defendant, The Rector and Visitors of George Mason University, is an educational institution, instrumentality and agency of the Commonwealth. (*Defendant's Opening Brief*, 1-2). 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. (*Defendant's Opening Brief*, 1-2).

> 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." (*Complaint*, ¶¶ 10-11).

ARGUMENT

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

Introduction

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 especially descriptive and directed that those coming to Virginia to be heavily armed including: "armour, weapons, ordinance,

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

munition, powder, shot…for their use and defence”.[2] Despite the right and history in Virginia of the private keeping and bearing of all types of arms at all places, there is no known direct case law on Va. Const. Art. I, § 13.

The trial court correctly recognized that the People of Virginia have always had an 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 [Transcript, 4 (July 31, 2009)]. 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 codified in the same provision. (*Plaintiff's Opening Brief*, 1-17).

The Proper Standard of Review

This Court reviews constitutional arguments and pure questions of law *de novo*. *Shivaee 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). 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

[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).

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).

Virginia recognizes the doctrine of co-extensive protections as espoused in *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 449 (1824)(Right to bear arms); *Paris v. Commonwealth*, 35 Va. App. 377, 381, 383, 545 S.E.2d 557, 559-560 (2001) and *Henry v. Commonwealth,* 32 Va. App. 547, 551, 529 S.E.2d 796, 798 (2000). This enforces the U.S. Const. Amend. II., against the Commonwealth and its agencies. See also *Planned Parenthood of Southeastern Pennsylvania et al. v. Casey, Governor of Pennsylvania, et al.,* 505 U.S. 833, 846-851 (1992). Va. Const. Art. I, § 13 however contains greater protections and requirements than the U.S. Const. Amend. II.

Dicta Can Not 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. [Transcript, 5 (July 31, 2009)], 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, not upon the natural rights of the People. The legislature or its agents cannot restrict or alter a self-executing constitutional provision. 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 *Nordyke v. King*, 563 F. 3rd 439, 459 (9th Cir. 2009) for its reciting of the dicta in *Heller* to cement its opinion was error upon error. The *Nordyke* case was vacated two days before the release of the trial court's oral opinion and the *dicta* the trial court relied upon cannot be cited as authority. 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 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, 367-368 (2009) (Citing *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 399-400 (1821)).

GMU is Not a "Sensitive" Place

GMU's regulation is not long standing which is the first prong of the dicta test in *Heller* 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." [Transcript, 61 (July 22, 2009)]. 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* is shattered as Justice Marshall wisely predicted. "To be ignorant of what occurred before you were born, is to remain always a child. For what is the worth of human Life, unless it is woven into the life of our ancestors by the records of history?" Marcus T. Cicero, *Cicero: Brutus*, *Orator*, 395 (Harry M. Hubbell trans. 1997).

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 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 founding fathers believed training was a means to a well regulated militia which was vital to the security of a free state. "That we will use our utmost Endeavours, as well at 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*, in 1 *The Papers of George Mason*, 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. *District of Columbia v. Heller*, 128 S. Ct., 2783, 2809 (2008)(quoting with approval *Nunn v. State*, 1 Ga. 243, 251 (1846)).

A place where college 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 putting in place the same regulation in 1776 and trying to enforce it by the loyalist members of the College? Fortunately *Heller's* false dicta requirements 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 or under Va. Const. Art. VIII, § 9. 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. 08-43 (Sep. 2008). The Attorney General did not recognize GMU's regulation because "the 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). An installation policed under the auspices of an Agency that allows armed felon police officers and prohibits law-abiding citizens to be armed cannot logically be a "sensitive" place and fails the strict scrutiny standard. There is no compelling state interest in having armed felons at GMU versus law-abiding citizens.

The regulation allowing armed felons under the color of the law and not allowing armed law-abiding citizens violates the U.S. Const. Amend. XIV., as armed felons are a suspect class under the equal protection clause. Armed felons are not the good people of Virginia. *Custis v. Lane*, 17 Va. (3 Munf.) 579, 593 (1813)("The declaration of rights is stated to have been made by the representatives 'of the good people of Virginia;' and it is declared, 'that these rights do pertain to them, and their posterity, as the basis and foundation of government.'").

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 or Hessians and others not attached to the community. 3 *The Papers of George Mason*, 1080-1081 (Robert A. Rutland ed. 1970) [Transcript, 17-20 (July 22, 2009)]. Police forces or "troops" are not the militia and are full time paid paramilitary professionals under Va. Code § 44-6. "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.

The Regulation is Not Narrowly Tailored

GMU's regulation is not narrowly tailored under the strict scrutiny analysis because it is effectually a total ban. 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's total prohibition does not allow Mr. DiGiacinto to enjoy the same rights of obtaining "the broadest possible diffusion of knowledge" or "the opportunity for the fullest development" that other citizens do at buildings, events, or "where people gather", that are open to the general public. "If [a] provision has no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it is patently unconstitutional" *Ohree v. Commonwealth*, 26 Va. App. 299, 305, 494 S.E.2d 484, 487 (1998).

GMU is a public university. The trial court's citation of *ACLU v. Mote,* 423 F.3d 438 (4th Cir. 2005) for the proposition that, "First, the University

traditionally is not open to the public" is misplaced. [Transcript, 5 (July 31, 2009)]. 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, 222-223, 591 S.E.2d 72, 75 (2004)." *Jones* is controlling, not *ACLU v. Mote*. If a building or event is open to the public then it must be open to all and not violate the U.S. Const. Amend. XIV. *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, 665-666, 529 S.E.2d 851, 853-854 (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 under a self-executing constitutional provision in this case is a well

regulated militia, composed of the body of the people, trained to arms…therefore, the right of the people to keep and bear arms shall not be infringed. The regulation bars the very people who are the militia and only serves to weaken the defense of the state. Training the students to arms and having their own armed student corps as was envisioned by Thomas Jefferson is the proper constitutional means of obtaining safety under Virginia's Constitution.

GMU wants this Court to believe that a university's only purpose is intellectual learning, basketball, and entertainment at the Patriot Center, but not the responsibility of the "Practices of Manhood" by learning the military exercises that good citizen/students require for a well regulated militia. GMU wants this Court to help destroy the militia by disarming the people.[3] GMU wants this Court to declare that individuals cannot be trusted and deny them the right of self-defense. This of course the Court cannot do.

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[3] "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*, 1074-1075 (Robert A. Rutland ed 1970).

Heller, 128 S. Ct. 2783, at 2801(Self-defense is the central component of the right).

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 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. There was not a public place that was off limits to armed full citizens of Virginia in 1776. "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. "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*, *The Rights of Persons*, 145-146 (William W. Birch & Adam Small 1803).

The People wisely placed restrictions on their agents upon the formation of the Commonwealth.

> The instrument by which the government is thus established, and the powers, or more properly the duties, of the public functionaries and agents, are defined and limited, is the visible constitution of the state…Hence every attempt in any government to change the constitution (otherwise than in that mode which the constitution may prescribe) is in fact a subversion of the foundations of its own authority. 1 Tucker, *Blackstone's Commentaries: supra*, Appendix, at 19-20.

GMU has not met its burden under the strict scrutiny standard. There is no compelling state interest in allowing convicted felons to be armed while at the same time disarming law-abiding citizens. GMU cannot restrict or alter a self-executing constitutional provision for it has no legal authority to do so. "[w]here a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provision. In short, if complete in itself, it executes itself." *Davis v. Burke*, 179 U.S. 399, 403 (1900).

An unorganized, unarmed, and untrained militia is not a well regulated militia. Individuals apart from the militia have a right to self-preservation using arms that are not surrendered by entering a state of society. "[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). Regulation 8VAC35-60-20 is unconstitutional.

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.

Va. Const. Art. I, § 14, is a prohibitory section of the Bill of Rights and therefore is a self-executing constitutional provision that waives GMU's sovereign immunity. *Gray*, 276 Va. at 106, 662 S.E.2d at 73. ("The constitutional provisions at issue in this case place duties and restrictions upon the Commonwealth itself and its departments. To give full force and effect to the provisions as self-executing, a person with standing must be able to enforce them through actions against the Commonwealth.")

This Court ruled on the matter of unlawful authority and Va. Const. Art. I, § 14 in 1793:

> 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. *Kamper v. Hawkins*, 3 Va. (1 Va. Cases) 20, 40-41 (1793).

Tens years after being a justice in *Kamper 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**" 4 St. George Tucker, *Blackstone's Commentaries*, *Appendix, Concerning Treason,* 22-23 (William W. Birch & Adam Small 1803).

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**."

GMU cannot lease, sell and convey any real estate with out permission from the Governor **first obtained** under Va. Code § 23-91.33. GMU cannot be separate from or independent of the Commonwealth and promulgate regulations without prior consent. GMU's enabling legislation is to be strictly construed against the University and by Va. Code § 1-248. GMU's regulation must conform to the general laws of the Commonwealth because 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.

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. "[w]hile sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *University of Utah v. Shurtleff*, 144 P.3d 1109, 1121 (Utah 2006)(The University must comply with applicable statutory law on firearms). 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. [Transcript, 8-10 (July 31, 2009)] (*Complaint*, Count II, ¶ 26).

"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 is trying to rely on the general trespass statute Va. Code § 18.2-119 to enforce its regulation because the legislature cannot delegate the power to define crimes to GMU. *Taylor*, 187 Va. at 220, 46 S.E.2d at 387. The General Assembly or the People have not made it a crime to possess firearms at universities.

The Will of the People and Their Representatives

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

> 2. 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; to whom they are accountable, and whose Burthens they share; in which consists the Safety and Happiness of the Community: for if this Part of the Constitution was taken away, or materially altered, the Government must degenerate either into an absolute and despotic Monarchy, or a tyrannical Aristocracy, and the Freedom of the People be annihilated. George Mason, *Fairfax County Resolves* (July 18, 1774) *1 The Papers of George Mason*, 201-202 (Robert A. Rutland ed. 1970).

George Mason later transformed this idea into Va. Const. Art. I, §§ 6 & 7 and Va. Const. Art. IV, § 1. GMU is not the representative 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? Has any one had a right of entering the forum? …But the guards were arranged in such a manner, that, as the access of an enemy to a city is prevented, so you might in this instance see the burgesses and the tribunes of the people cut off by forts and works from all entrance to the forum. 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).

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 v.*

Roanoke, 179 Va. 47, 50-51, 18 S.E.2d 287, 288 (1941). 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).

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 under a vague notion of general safety. Agency powers must be strictly construed under the Constitution and only the General Assembly can suspend the laws or the execution of the laws. GMU cannot be separate from or independent of the Commonwealth under Va. Const. Art. I, § 14 nor promulgate regulations without authority or that are inconsistent with the general laws.

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. *Taylor*, 187 Va. at 220, 46 S.E.2d at 387.

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. GMU must obey the law. 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. The privileges conferred by Va. Codes § 18.2-287.4 and § 18.2-308(D) cannot be deprived to Mr. DiGiacinto by GMU's regulation as it is a usurpation of lawful authority.

GMU and the trial court relied upon *Peyton v. Williams*, 206 Va. 595, 600, 145 S.E.2d 147, 151 (1965), for the notion that because two intervening session 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. The regulation is not long standing and violates the constitutional principals required and ignores the reality that under the separation of powers, Va. Const. Art. V, § 6, the Executive branch has the power to veto the bills of the General Assembly. Does the General Assembly have to pass all laws with a veto proof margin and to override a veto to mute this Court's opinion in *Peyton*? Is *Peyton* good law if the General Assembly passed a bill specifically addressing part of the issue sixteen years before in Va. Code § 55-248.9(A)(6)? 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. Is *Peyton* controlling over the acts of the U.S. Supreme Court or any judicial intervention? See *Smith v. Bryan*, 100 Va. 199, 204, 40 S.E. 652, 654 (1902). *Peyton* creates an unlawful dispensing power over the laws by agents of the government.

> That altho' the thirteenth Article of the Bill of Rights expressly declares "that in all Cases, the Military shou'd be under strict Subordination to, and governed by the Civil Power" Yet Horses & other Effects have been frequently taken from the Inhabitants by Military-Officers, and Soldiers, without authority from, or application to the Civil Magistrate, and without Appraisement; by which many poor Familys have been ruined…Thus every Petty-Officer of Government, to indulge his own Caprice, or serve his private Interest, assumes a dispensing-Power over the Laws; a Crime for which, even in a monarchical Government, King Charles the first forfeited his Life, and James the second his Crown. George Mason, *A Petition and Remonstrance from the Freeholders of Prince William County* (December 10, 1781) in 2 *The Papers of George Mason*, 706-707 (Robert A. Rutland ed. 1970).

"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). "For, by this means, tyranny has been sapped, the departments kept within their own spheres, the citizens protected, and general liberty promoted." *Commonwealth v. Caton* & al., 8 Va. (4 Call) 5, 7 (1782). The General Assembly cannot acquiesce to GMU

under the Constitution. *Ellinger v. Commonwealth*, 102 Va. 100, 105-106, 45 S.E. 807, 808 (1903). *Ellinger* demonstrates clearly how this Court's holding in *Peyton* invites knavery to the subversion of the liberties of the People. 2 *The Papers of George Mason*, *supra* at 709.

"But when by degrees these essential maxims of the state were undermined, and pretences were found to continue commanders beyond the stated times, their army no longer considered themselves the soldiers of the Republic, but as the troops of Marius or of Sylla, of Pompey or of Ceasar, of Marc Antony or of Octavius. The dissolution of that once glorious and happy commonwealth was the natural consequence, and has afforded a useful lesson to succeeding generations." 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).

CONCLUSION

Mr. DiGiacinto requests that an appeal be **GRANTED** in this case.

Respectfully Submitted,

BY: ______________________________
Rudolph DiGiacinto
Appellant, *pro se*

CERTIFICATE

I, Rudolph DiGiacinto, Plaintiff, *pro se*, hereby certify that:

1. The Name and Address of Appellant, *pro se* is:

Rudolph DiGiacinto

The Name of Appellee is: The Rector And Visitors Of George Mason University. Counsel for Appellee is:

Mr. David G. Drummey
Assistant Attorney General
Virginia State Bar No.: 44838
George Mason University
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2. I hereby certify that seven copies of this Petition for Appeal have been filed with this Court. That a true copy was sent on or before the filing of this Petition for Appeal to counsel for the Defendant: Mr. David G. Drummey, Assistant Attorney General, George Mason University, 4400 University Drive, MS 2A3, Fairfax, Va. 22030, by first class mail, postage prepaid, on September 22, 2009.

3. Mr. DiGiacinto wishes to state orally to a panel of this court the reasons why this Petition should be granted and to do so in person.

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Plaintiff, *pro se*.