

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX**

**RUDOLPH DIGIACINTO**

*Plaintiff,*

v.

**THE RECTOR AND VISITORS OF GEORGE  
MASON UNIVERSITY**

*Defendant.*

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Case No. 2008-14054

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**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT’S  
MEMORANDUM OF SOVEREIGN IMMUNITY, DEMURRER AND MOTION TO  
DISMISS**

Mr. DiGiacinto, *pro se*, respectfully submits the following in opposition to the Defendant’s Memoranda for the Plea of Sovereign Immunity, Demurrer and Motion to Dismiss.

**ARGUMENT**

**SELF-EXECUTING CONSTITUTIONAL PROVISIONS WAIVE THE  
COMMONWEALTH’S SOVEREIGN IMMUNITY**

***The Right to Uniform Government***

Va. Const. Art. I, § 14, is a self-executing constitutional provision that waives George Mason University’s (GMU) sovereign immunity. *Gray v. Virginia Secretary of Transportation*, 276 Va. 93, 106, 662 S.E.2d 66, 73 (2008). “The constitutional provisions at issue in this case place duties and restrictions upon the Commonwealth itself and its departments.” *Id.* at 106. The term “people” in the Bill of Rights refers to individuals. *District of Columbia et al. v. Heller*, 544 U.S. \_\_\_ 128 S. Ct. 2783, 2790-2791 (2008). Mr. DiGiacinto has the right to enforce this

provision in a common law action to declare whether GMU has the power or authority to promulgate and enforce regulation 8VAC35-60-20 as it is an *ultra vires* act and is *void ab initio* (Bill of Complaint Counts II & III.). *Gray, supra* at 106.

In 1781 George Mason wrote to Thomas Jefferson on the issue of sovereignty and exceeding lawful authority. “[t]he Doctrine now industriously propagated ‘that the late Revolution has transferred the Sovereignty formerly possessed by Great Britain, to the United States, that is to the American Congress’, A Doctrine which, if not immediately arrested in its progress, will be productive of every Evil; and the Revolution, instead of securing, as was intended, our Rights & Libertys, will only change the Name & place of Residence of our Tyrants... for if they can stride over the lines of Confederation and assume Rights not delegated to them by the Legislatures of the different States, in one instance, they can in every other that the lust of power may suggest.” *Letter of George Mason to Thomas Jefferson* (Sept. 27, 1781) in *2 The Papers of George Mason* 697-698 (R. Rutland ed. 1970).

When any branch of government or agency transcends its powers or authority, it violates Va. Const. Art. I, § 14. “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.” *Kemper v. Hawkins*, 3 Va. (1 Va. Cases) 20, 40-41 (1793).

Tens years after being a justice in *Kemper v. Hawkins*, St. George Tucker published his iconic work on *Blackstone’s Commentaries* and wrote again about the issue. “A second branch of high treason against the *state*, consists in erecting or establishing or causing or procuring to be erected or established, any government separate from, or independent of the government of Virginia, within the limits thereof, unless by act of the legislature of this commonwealth for that purpose first obtained: or in holding or executing under any such usurped government any office legislative, executive, judiciary, or ministerial, by whatever name such office may be distinguished, or called; or in swearing or otherwise solemnly professing allegiance or fidelity to the same; or, under pretext of authority derived from or protection afforded by such usurped government, in resisting or opposing the due execution of the laws of this commonwealth.” 5 St. George Tucker, *Blackstone’s Commentaries, Concerning Treason*, at 22-23 (William W. Birch & Adam Small 1803).

“This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the state to declare and decree that he is the state; to say “L’Etat, c’est moi.” Of what avail are written constitutions, whose bills of right for the security of individual liberty have been written too often with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them, and that too with the sacred authority of law, not only compelling obedience, but

entitled to respect? And how else can these principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the state? The doctrine is not to be tolerated.” *Poindexter v. Greenhow*, 114 U.S. 270, 290-291 (1885)(Virginia case on Immunity).

“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). The Constitution of Virginia vests the legislative power in the General Assembly under Article IV, Section 1. *Gray, supra* at 105-106. 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)(“Its authority must affirmatively appear from the statute under which it claims to act. It is not vested with discretion to ignore or transgress statutory limitations, even to accomplish what it may deem to be desirable ends.”); *Ellinger v. Commonwealth*, 102 Va. 100, 105-106, 45 S.E. 807, 808 (1903)(If it transcends its power, or if it acts in contravention of the Constitution, its acts are void.); *Kamper v. Hawkins, supra* at 32 (“But there is no position which depends on clearer principles, than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void.”).

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. 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).

“[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). GMU has not been given either explicit or implied power by the General Assembly to regulate handguns 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)(“[t]he Rector and Visitors are at all times subject to the control of the General Assembly, and should conform to such laws as it might, from time to time, enact for their government.”). The General Assembly has also 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.

GMU may not “forbid what the legislature has expressly licensed, authorized, or required.” *Blanton v. Amelia County*, 261 Va. 55, 64-65, 540 S.E.2d 869, 874 (2001). 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)(Supreme Court holding that “this court’s prior pronouncements on the issue of university governance compel the conclusion that the University is subject to legislative control, and therefore cannot enforce its firearms policy in contravention of state law.”).

The restraint placed upon GMU is clear. “A person’s privilege to carry a concealed

handgun is considered universal within the Commonwealth<sup>1</sup> subject to limited circumstances. The General Assembly has specifically set out those places where the carrying of a concealed handgun is prohibited.” Op. Va. Att’y Gen. No. 02-074 (2002). Universities are not places listed as off limits to permit holders by the General Assembly. As stated in the recent opinion of the Attorney General on the open carry of firearms: “It is within the sole discretion of the General Assembly to limit the carrying of firearms... beyond that restricted by § 18.2-287.4.” Op. Va. Att’y Gen. No. 08-43 (2008).

Va. Code § 55-248.9(A)(6) also prohibits in rental agreements: “Agrees 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 is a provider of public housing<sup>2</sup> and is subject to this restriction. Although an opinion of the Attorney General was issued on universities and firearms in 2006<sup>3</sup>, that opinion is contrary to Virginia law herein expressed.

“It is a fundamental principle of our system of government that the right of men are to be determined by the law itself, and not by the let or leave of administrative officers or bureaus... and the legislative branch of the government may not divest itself of this function or delegate it to executive or administrative officers.” *Assaid v. Roanoke*, 179 Va. 47, 50, 18 S.E.2d 287, 288 (1941). Only “[r]egulations, promulgated as they were pursuant to definitive statutory authority, have the force and effect of law.” *Carbaugh v. Solem*, 225 Va. 310, 314, 302 S.E.2d 33, 35 (1983).

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<sup>1</sup> *Royall v. Virginia*, 116 U.S. 572, 581-582 (1886)(A license is good throughout the Commonwealth. Citing *Humphreys v. City of Norfolk*, 66 Va. (25 Gratt) 97, 99 (1874)).

<sup>2</sup> <http://housing.gmu.edu/general/areas/>

<sup>3</sup> Op. Va. Att’y Gen. No. 05-78, (2006)(Whether Virginia law allows public colleges and universities to prohibit the carrying of concealed weapons by permitted individuals onto public property).

The statutes and rights that GMU is trying to suppress by hiding behind sovereign immunity are the very statutes that form the boundary and limitation of their authority and power. “[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); Va. Const. Art. I, § 2. For if GMU can stride over the lines of the Constitution in this instance, and assume Rights not delegated to them by the Legislature, they can in every other that the lust of power may suggest. They have violated Va. Const. Art. I, § 14, and must be compelled to answer for the lawless usurpation.

### ***The Right of Due Process of Law***

“The right of the people to keep and bear arms shall not be infringed.” Va. Const. Art. I, § 13. “That no person shall be deprived of his life, liberty, or property without due process of law...” Va. Const. Art. I, § 11. These constitutional provisions are self-executing and waive GMU’s sovereign immunity. *Gray, supra* at 106. GMU as an educational institution is generally exempted from the provisions of the Virginia Administrative Process Act (VAPA) under § 2.2-4002(A)(6). The purpose of the VAPA is to be a “catch-all” source of due process where the agency’s basic law fails to provide it. *School Board v. Nicely*, 12 Va. App. 1051, 1058-1059, 408 S.E.2d 545 (1991). GMU’s basic laws under its enabling legislation Va. Code § 23-91.24 *et seq.* or under Va. Code § 23-9.2:3 provide no due process to Mr. DiGiacinto. *Garfield v. Goldsby*, 211 U.S. 249, 262 (1908)(“The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law.”).

The term “due process of law” has its origin in the Magna Charta and meant the “law of the land”. *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat) 235, 241 (1819). “A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty,’ or it may arise from an expectation or interest created by state laws or policies”. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005); *Wolff v. McDonnell*, 418 U. S. 539, 556-558(1974)(“We think a person’s liberty is equally protected, even when the liberty itself is a statutory creation of the State.”). A property interest requiring due process is required for Mr. DiGiacinto and his permit under Va. Codes § 18.2-308 and § 18.2-287.4. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-578 (1972).

“Liberty itself consists essentially, as well in the security of private property, as of the persons of individuals...” *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 276-277 (1828). Mr. DiGiacinto has a liberty interest in his right to self-defense and to keep and bear arms, for “the right of self-defence is the first law of nature” and is therefore fundamental. 1 St. George Tucker, *Blackstone’s Commentaries*, supra at 300.; *Parrish v. Commonwealth*, 81 Va. 1, 12 (1884); *District of Columbia et al. v. Heller*, supra 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. He bases that assertion solely upon the prologue—but that can only show that self-defense had little to do with the right’s codification; it was the central component of the right itself.”); *Ballard v. Commonwealth*, 228 Va. 213, 216, 321 S.E.2d 284, 286 (1984)(A fundamental right is one explicitly or implicitly guaranteed by the Constitution.).

Any statute that affects Mr. DiGiacinto's right to self-defense implicates fundamental due process rights. *Ethridge v. Medical Center Hospitals*, 237 Va. 87, 97-98, 376 S.E.2d 525, 530 (1989). "Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security." *Ingraham v. Wright*, 430 U.S. 651, 672-673 (1977). Va. Code § 18.2-308(D) was created specifically for personal security.

The interplay of Va. Codes § 18.2-308, § 18.2-287.4 and regulation 8VAC35-60-20 are penal in nature. Mr. DiGiacinto has the right for this court to declare what his rights are in relation to those statutes and regulation. *Bowie v. City of Columbia*, 378 U.S. 347, 351 (1964)(Trespass case citing: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."); *United States v. Lanier*, 520 U.S. 259, 265-270 (1997)(Fair Warning Doctrine and Due Process). "The very essence of civil liberty certainly consists in the right of every individual to claim the protections of the laws". *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). "It is emphatically the province and duty of the Judicial Department to say what the law is...if two laws conflict with each other, the courts must decide on the operation of each." *Id.* at 177.

"As enacted, the Fourteenth Amendment confers substantive rights against the States which, like the provisions of the Bill of Rights, are self-executing." *City of Boerne v. Flores, Archbishop of San Antonio, et al.*, 521 U.S. 507, 524 (1997); *Gray, supra* at 106. This court has jurisdiction to declare whether GMU has lawful authority to promulgate and enforce its regulation, or if the fundamental rights of Mr. DiGiacinto are infringed and whether he has received the due process of law. GMU cannot break the law and then claim sovereign immunity to perfect its crime. "In short, can one branch of the government call upon another to aid in the

violation of this sacred letter? The answer to these questions must be in the negative.” *Kamper v. Hawkins, supra* at 59.

“Where there is no administrative remedy equal to the relief sought, a complainant in a declaratory judgment proceeding, properly states a justiciable cause of action.” *Mosher Steel v. Teig*, 229 Va. 95, 100-101, 327 S.E.2d 87, 91-92 (1985); *Thompson v. Smith*, 155 Va. 367, 387-389, 154 S.E. 579 (1930).

### **CONCLUSION**

WHEREFORE, for the reasons stated above, Mr. DiGiacinto prays that this court overrules the Defendant’s Plea of Sovereign Immunity, Demurrer and Motion to Dismiss.

Respectfully Submitted,

By: \_\_\_\_\_  
Rudolph DiGiacinto