

IN THE
SUPREME COURT OF VIRGINIA

RUDOLPH DIGIACINTO,

Appellant,

v.

THE RECTOR & VISITORS OF GEORGE MASON UNIVERSITY,

Appellee.

On Petition for Appeal from
The Circuit Court of Fairfax County

**BRIEF OF APPELLEES THE RECTOR & VISITORS
OF GEORGE MASON UNIVERSITY**

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**BRIEF OF APPELLEES THE RECTOR & VISITORS
OF GEORGE MASON UNIVERSITY**

The Attorney General of the Commonwealth, on behalf of the Rector and Visitors of George Mason University, submits this Brief of Appellee. For the reasons stated herein, the judgment below should be affirmed.

INTRODUCTION

Despite the deep historical curiosity reflected in the Opening Brief of Appellant, the issues presented for review are narrow and precise. With respect to the first assignment of error, this appeal concerns the constitutionality of a George Mason University regulation prohibiting the possession of firearms in university buildings and at university events. The regulation generally does not prohibit individuals from possessing firearms in the open areas between university buildings.

Although Plaintiff sought to challenge the University's power to limit his statutory concealed carry rights, this claim was dismissed on the grounds of sovereign immunity. Plaintiff challenges this ruling under his second assignment of error.

Finally, assuming that he prevails on his second assignment, Plaintiff challenges the authority of the University to adopt the regulation.

STATEMENT OF THE CASE

Plaintiff filed his Bill of Complaint challenging 8 VAC 35-60-20 on October 27, 2009 seeking declaratory and injunctive relief. (J.A. 1). The regulation provides: "Possession or carrying 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." (J.A. 3). Plaintiff alleged that, although not a student, he uses University facilities, principally the library, which he visits to research issues affecting the Second Amendment. (J.A. 2).

On March 20, 2009, the University filed its Demurrer and Plea of Sovereign Immunity (J.A. 19) on the statutory concealed carry claim which was granted by Order dated April 27, 2009. (J.A. 23). Briefing proceeded on the remaining constitutional claim. (J.A. 45-105). Because an individual federal constitutional right to keep and bear arms had been definitively recognized for the first time in *District of Columbia v. Heller*, 544 U.S. ___, 128 S. Ct. 2783 (2008), the University focused upon the statement in the majority opinion that "nothing in our opinion should be taken to cast doubt

on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . .". (J.A. 47). The evidence that the University is a sensitive place as set forth in the Statement of Facts was stipulated to by the parties. (J.A. 108).

A hearing was held on July 22, 2009. (J.A. 106). A Final Order in favor of the University was entered August 14, 2009. (J.A. 188-90). A timely Notice of Appeal was filed August 17, 2009, (J.A. 192-93), and this appeal followed.

QUESTIONS PRESENTED

As the Circuit Court stated in its Final Order, the three count complaint presented three claims:

1. Is the regulation unconstitutional under Art. I, § 13 of the Constitution of Virginia or under the Second Amendment to the United States Constitution?
2. Does the University lack delegated power to regulate handguns?
3. Does the regulation conflict with state law?

(J.A. 188).

The second and third claims were dismissed on sovereign immunity grounds and therefore may be combined into this second question

presented: Are Plaintiff's statutory claims for declaratory and injunctive relief barred by sovereign immunity?

STATEMENT OF FACTS

The parties stipulated "to the facts which were asserted in the briefs." (J.A. 108-09). Based upon that stipulation, the circuit court found the following facts to be material to its decision that the places covered by the regulation are sensitive:

Heller does not define what constitutes a sensitive place, but the Supreme Court lists as examples schools, government buildings, "Presumably because possessing firearms in such places risks harm to great numbers of defenseless people; that is, children," that the buildings are important to government functioning.

George Mason University notes there are 5,000 employees and 30,000 students enrolled, ranging from age 16 to even senior citizen age. Three-hundred fifty-two in the incoming Freshman class will be under the age of 18 beginning this semester. Approximately 50,000 elementary and high school students attend summer camps at the University. They use these academic buildings, which are part of the regulation. There also is a child development center in which approximately 130 student/employee children are enrolled preschool and in both the libraries and the Johnson Center, they are regularly frequented by children ages two to five years old.

High school graduations, athletic games, concerts and circus performances are just a few of the family activities occurring on campus. The individuals who are part of this large community of interests clearly are the type of individuals whose safety concerns on a public university campus constitute a compelling

State interest. The buildings and activities described in the regulations are those wherein the individuals gather; therefore, are sensitive places as contemplated by [*Heller*.]

(J.A. 179-80).

ARGUMENT

- I. THE REGULATION IS CONSISTENT WITH BOTH THE NATIONAL CONSTITUTION AND THE VIRGINIA CONSTITUTION.
 - A. Assuming the Second Amendment Is Applicable to the States, the Regulation Is Consistent with the Second Amendment.

The Supreme Court of the United States presently has before it the question whether the Second Amendment is incorporated against the States by the Fourteenth Amendment. *McDonald v. City of Chicago*, cert. granted, 130 S. Ct. ____ 78 U.S.L.W. 3013 (U.S. Sept. 30, 2009) (No. 08-1521). In the lower court, the University assumed that the Second Amendment is incorporated and it makes the same assumption here.¹

¹ Regardless of whether one accepts the total incorporation approach of Justice Black, see *Adamson v. California*, 332 U.S. 46, 68-75 (1947) (Black, J., dissenting); or the selective incorporation approach ultimately adopted by the Court, see *Duncan v. Louisiana*, 391 U.S. 145, 147-49 (1968), the right to bear arms is incorporated against the States. Quite simply, there is no basis for treating the Second Amendment as inferior to the other guarantees of the Bill of Rights. Moreover, it has been over sixty years since the Court found that a right was not incorporated against the States. See *Adamson*, 332 U.S. at 52.

Because Second Amendment jurisprudence is in its infancy as an individual federal right, there are a number of open questions. The one thing that we do know is that the right is not absolute, permitting the prohibition of guns in sensitive places. *Heller*, 128 S. Ct. at 2816-17 (The Second Amendment does not prohibit government from imposing "longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in *sensitive places* such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.") (emphasis added). This is not dicta. Instead, it is an integral part of the foundational definition of a newly recognized individual federal right. Hence, Virginia may continue to prohibit firearms in courthouses, *Virginia Code* § 18.2-283.1, elementary and secondary schools, *Virginia Code* § 18.2-308.1, places of worship, *Virginia Code* § 18.2-283, airport terminals, *Virginia Code* § 18.2-287.01, and certain public parks, *Virginia Code* § 18.2-287.4. Similarly, the University may restrict firearms at university buildings and at widely attended university events.

In *Heller*, 128 S. Ct. at 2821, the United States Supreme Court did not reach the issue of what standard of scrutiny should be applied to regulations restricting the right to bear arms, holding that the

comprehensive ban enacted by the District of Columbia failed under any standard of review.² This Court need not reach the issue either, because, if the sensitive place rule does not presage a lower standard of review than strict scrutiny, it represents a declaration that sensitive place restrictions on the right to keep and bear arms are supported by a compelling state interest.

Campus safety, as an expression of the police power, is a most fundamental and compelling state interest under *Heller* on the same principle as the school example employed in that case. Academic buildings, administrative office buildings, student residence buildings, dining facilities, and sporting, entertainment and educational events on campus are sensitive places. Non-student and non-employee citizens do not have a categorical right even to be present in such locations, and the University may condition the privilege of use as a means of promoting the health, safety, and welfare of the University community.

Without the regulation, the University community's safety is seriously compromised. Unquestionably, the vast majority of gun owners are law-abiding citizens. Nevertheless, a rejected student applicant could walk into the Dean of Admissions office with an openly visible sidearm to discuss

² See also *Heller*, 128 S. Ct. at 2851-52 (Breyer, J., dissenting) (discussing standard of review in Second Amendment challenges).

why the University rejected his application. An expelled student could do the same while he met with the Dean of Students to discuss his appeal of his expulsion. A disgruntled ex-boyfriend armed with a large hunting knife mounted on his side could enter the student residences to speak to his former girlfriend where she lived. Finally, any person who wishes to enter Fenwick Library with a sidearm, could not only frighten students and minors such as preschoolers, but also expose them to unnecessary risks such as an accidental discharge.

The University can enact rules governing student speech in University offices or classrooms even though speech, like carrying a firearm, is a fundamental right. Students do not have the right to interrupt a class, alumni function or graduation ceremony to express a particular viewpoint, and neither do they have a right to carry a firearm anywhere and at any time. The University's interest in regulating firearms is at least as compelling as the need to regulate the time, place and manner of speech.

The regulation not only serves a compelling state interest, it is also narrowly tailored. Rather than banning all weapons on campus, the University's ban is limited in a way that continues to be constitutional after *Heller*. That is, it is limited to sensitive places where University students, employees, invitees and community members meet and gather. Individuals

may lawfully carry a weapon in public places while traversing the open grounds of University campuses. The Board of Visitors acted lawfully in crafting a regulation that considered both the safety of its students, employees, invitees and community members and the exercise of constitutional liberties. Instead of essentially closing the gates of the entire campus to the public, the University implemented the least restrictive prohibition that allows all non-employee and non-student citizens to traverse the campus grounds with his or her weapon openly. They simply cannot do so while they enter any academic buildings, administrative office buildings, student residence buildings, dining facilities, or while attending certain university events.

B. The Sensitive Place Rule Is Consistent with the Virginia Constitution.

While this Court has never had an occasion to address the substantive meaning of *Virginia Const.* art. I, § 13, it has repeatedly held that provisions of the Virginia Constitution that are substantively similar to those in the federal constitution will be afforded the same meaning. See, e.g., *Shivaee v. Commonwealth*, 270 Va. 112, 119, 613 S.E.2d 570, 574 (2005) (due process); *Habel v. Indus. Dev. Auth.*, 241 Va. 96, 100, 400 S.E.2d 516, 518 (1991) (Establishment Clause and art. I, § 16 of the

Virginia Constitution). There is no reason to depart from this principle here. The right to bear arms language in the Virginia Constitution was derived from the Second Amendment and should be afforded the same construction.

Furthermore, Article I, § 13 must be deemed to contain a sensitive place rule. This is so because *Virginia Code* § 18.2-283 barring guns from certain places of worship had been adopted prior to the adoption of the present constitution. That history would seem to be decisively in favor of the authority of the Commonwealth to regulate the carrying of guns in sensitive places. The legislature is deemed to know the existing law and to legislate in light of that knowledge. *City of Roanoke v. James W. Michael's Bakery Corp.*, 180 Va. 132, 143, 21 S.E.2d 788, 793 (1942) ("Framers of the Constitution are presumed to have been aware of prior decisions of their own courts and of legislative acts . . ."). If the legislature in revising the constitution is deemed to know that it had in the past banned guns from sensitive places and was continuing to maintain such a law on the books at the time the constitution was adopted, its failure to explicitly prohibit them is evidence that Art. I, § 13 was not intended to do so by mere implication. Furthermore, by continuing to pass such restrictions for a long time after the adoption of the Constitution of 1971, the General Assembly has

engaged in practical construction of Art. I, § 13 which is entitled to deference. *City of Roanoke v. Elliott*, 123 Va. 393, 407, 96 S.E. 819, 824 (1918) (In cases of doubt, the construction placed on the Constitution by the legislature is entitled to consideration, but will not be permitted to overturn plain language.)

II. SOVEREIGN IMMUNITY BARS THE CHALLENGE TO THE UNIVERSITY'S AUTHORITY TO PROMULGATE THE REGULATION.

"The doctrine of sovereign immunity is alive and well in Virginia. It is an established principle of sovereignty . . . that a sovereign State cannot be sued in its own courts . . . without its consent and permission." *Gray v. Virginia Secretary of Transportation*, 276 Va. 93, 101, 662 S.E.2d 66, 70 (2008) (citation and quotation marks omitted). "As a general rule, the Commonwealth is immune from both actions at law for damages and from suits in equity to restrain governmental action or to compel such action. . . . Sovereign immunity may also bar a declaratory judgment proceeding against the Commonwealth," *Afzall v. Commonwealth*, 273 Va. 226, 231, 639 S.E.2d 279, 282 (2007) (citation and quotation marks omitted), and does so for merely statutory claims.

To be sure, sovereign immunity does not preclude declaratory and injunctive relief claims based on self-executing provisions of the Virginia

Constitution.³ *Gray*, 276 Va. at 104-07, 662 S.E.2d at 71-73. Thus, DiGiacinto may bring a declaratory and injunctive relief claim based on *Virginia Const.* art. I, § 13.

However, he may not bring a declaratory and injunctive relief claim challenging the University's authority to promulgate the regulation unless he bases his claim on a self-executing provision of the Virginia Constitution. DiGiacinto claims that the University's promulgation of the regulation violates the uniform government provision of *Virginia Const.* art. I, § 14. Thus, the question of whether sovereign immunity bars his claim turns on whether the *Virginia Const.* art. I, § 14 is self-executing.

As this Court explained, the test for determining if a provision is self-executing is straightforward:

³ Similarly, sovereign immunity does not prohibit declaratory and injunctive relief claims based on federal law. *See Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 317 & n.15 (1997) (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting) (All fifty States have, at least implicitly, recognized a state judicial power to direct state officers to conform their conduct to federal law.). Because "judicial power includes the duty 'to say what the law is,'" *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2684 (2006), there must be a mechanism to force government officials to conform to the law. *See New York v. United States*, 505 U.S. 144, 179 (1992). Indeed, four Justices of the United States Supreme Court have suggested that *State Bd. of Elections v. Forb*, 214 Va. 264, 265-66, 199 S.E.2d 527, 528 (1973), establishes the power of Virginia courts generally to enjoin state officials to conform their conduct to federal law. *Coeur d'Alene Tribe*, 521 U.S. at 317 n.15 (Souter, J., joined by Stevens, Ginsburg, & Breyer, JJ., dissenting). Thus, sovereign immunity does not preclude DiGiacinto's Second Amendment claim.

A constitutional provision is self-executing when it expressly so declares. Even without benefit of such a declaration, constitutional provisions in bills of rights and those merely declaratory of common law are usually considered self-executing. The same is true of provisions which specifically prohibit particular conduct. Provisions of a Constitution of a negative character are generally, if not universally, construed to be self-executing. . . .

A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be employed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.

Robb v. Shockoe Slip Foundation, 228 Va. 678, 681-82, 324 S.E.2d 674, 676 (1985) (citations and quotations omitted). The uniform government provision simply reaffirms a self-evident point—“[t]hat 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.” *Virginia Const.* art. I, § 14. It does not expressly declare itself self-executing. Nor does the provision specifically prohibit particular conduct. Nor does it supply a sufficient rule that can protect a right or impose a duty. Rather, the uniform government clause merely indicates general principles.

Because the uniform government provision is not self-executing, sovereign immunity bars DiGiacinto's challenge to the University's authority

to promulgate the regulation. As a consequence, the circuit court correctly dismissed this claim on sovereign immunity grounds.

III. SHOULD THIS COURT REACH PLAINTIFF'S STATUTORY CLAIMS DESPITE THE BAR OF SOVEREIGN IMMUNITY THOSE CLAIMS ARE DUE TO BE REJECTED.

Plaintiff's merits argument on his statutory claims are circular. "The granting of a concealed handgun permit shall not thereby authorize the possession of any handgun or other weapon on property or in places where such possession is otherwise prohibited by law" *Virginia Code* § 18.2-308(O). Rules and regulations are deemed to be law to the same extent as a statute. *Graham v. People Life Ins. Co.*, 7 Va. App. 61, 72, 372 S.E.2d 161, 168 (1988). Hence, if the regulation is valid, Plaintiff's statutory claims fail.

Plaintiff's theory of why the regulation is invalid is based upon conflict pre-emption and anti-delegation notions. However, the regulation here is not in conflict with any statute and conferring rights of governance and police, as has been done here, *Virginia Code* § 23-91.29; *Virginia Code* §§ 234, 234.1 and 23-238, is normal and usual not exotic or forbidden.

CONCLUSION

For the reasons stated above, the judgment below should be

AFFIRMED.

Respectfully submitted,

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

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