

---

---

**IN THE  
SUPREME COURT OF VIRGINIA**

**AT RICHMOND**

---

---

\_\_\_\_\_  
**Record No.**  
\_\_\_\_\_

**RUDOLPH DIGIACINTO**

Appellant,

v.

**VIRGINIA DEPARTMENT OF  
CONSERVATION AND RECREATION**

Appellee.

---

---

**PETITION FOR APPEAL**

---

---

Rudolph DiGiacinto  
*Pro Se*,  
8344 Darlington Ct.  
Springfield, Va. 22152



**SUBJECT INDEX**

	Page
Table Of Authorities .....	ii
Statement Of The Nature Of The Case And Of The Material Preceedings In The Circuit Court... 1	1
Assignments Of Error .....	1
Questions Presented .....	2
Statement Of Facts.....	2
Argument.....	4
I. Article I, Section 13, of the Virginia Constitution is self-executing and expresses the sovereign will of the people and therefore sovereign immunity has been waived by the people. ....	4
II. Sovereign immunity is inapplicable because the Va. Const. Article I, § 5, declares the separation of the branches of government and the power of judicial review is the only protection which exists against legislation which has become unconstitutional as applied.....	8
III. A violation of Article I, § 13 by the Commonwealth constitutes a breach of contract with the people of Virginia and therefore the doctrine of sovereign immunity has been waived and cannot be invoked. ....	13
IV. A violation of Mr. DiGiacinto’s rights under the Virginia Constitution Article I, § 13, creates a cause of action for Declaratory and Injunctive relief.....	15
Conclusion.....	16
Certificate .....	16

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
<i>Alden v. Maine</i> 527 U.S. 706 (1999) .....	10
<i>Benderson Development Co. v. Sciortino</i> , 236 Va. 136, 372 S.E.2d 751 (1988).....	13
<i>Burdette v. Michigan</i> , 166 Mich. App. 406, 408 NW2d 185 (1988).....	13
<i>Burns v. Board of Supervisors</i> , 218 Va. 625, 238 S.E.2d 823 (1977) .....	13
<i>Corum v. University of North Carolina</i> 413 S.E.2d 276 (N.C. 1992) .....	12
<i>Davis v. Burke</i> , 179 U.S. 399 (1900) .....	8
<i>Dean v. Paolicelli</i> , 194 Va. 219, 72 S.E.2d 506 (1952).....	5
<i>Finnerty v. Thorton Hall, Inc.</i> 42 Va. App. 628, 593 S.E.2d 568 (2004) .....	12
<i>Gray v. Byrant</i> , Fla. 125 So.2d 846, 851 (1960) .....	5
<i>John Aldridge v. The Commonwealth</i> , 4 Va. 447; Va. (2 Va. Cas.) 447, (1824).....	8
<i>Kamper v. Hawkins</i> , 3 Va. (1 Va. Cases) 20, 24 (1793).....	9, 10, 12, 13
<i>Katzberg v. Regents of University of Cal.</i> 58 P.3d 339 (Cal. 2002) .....	6
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137, 177 (1803).....	12
<i>Mattaponi Indian Tribe v. Commonwealth</i> , 43 Va. App. 690, 601 S.E.2d 667 (2004).....	12
<i>Robb v. Shockoe Slip Found.</i> , 228 Va. 678, 324 S.E. 2d 674 (1985) .....	5
<i>School Board v. Nicely</i> , 12 Va. App. 1051, 408 S.E.2d 545 (1991).....	5
<i>Spackman Ex Rel. Spackman v. Board of Educ.</i> , 16 P.3d 533, 537 (Utah 2000).....	5
<i>Thompson v. Smith</i> , 155 Va. 367, 154 S.E. 579 (1930) .....	15
<i>Virginia Bd. of Medicine v. VPTA</i> , 13 Va. App. 458, 413 S.E.2d 59 (1991).....	4, 10
<i>Wiecking v. Allied Medical Supply</i> , 239 Va. 548, 391 S.E.2d 258 (1990) .....	14

**STATUTES**

Va. Code § 8.01-184 ..... passim

Va. Code § 8.01-620 ..... passim

Va. Code §18.2-308 ..... 2, 3

Va. Code §2.2-4000 *et seq.* ..... 4

**OTHER AUTHORITIES**

1 *Hening’s Statutes at Large*, p. 127, (1623) ..... 6

1 *Hening’s Statutes at Large*, p. 365, (1651). ..... 6

1 *Hening’s Statutes at Large*, p.174, (1631) ..... 6

3 *Hening’s Statutes at Large*, pp. 335-342, (1705) ..... 7

7 *Hening’s Statutes at Large*, pp. 93-116, (1757) ..... 7

Ames, Susie M., *County Court Records of Accomack-Northampton, Virginia, 1640-1645*,  
University Press of Virginia Charlottesville, p. 105, 268 (1973) ..... 6

Black’s Law Dictionary, Fifth Edition, p. 255, (1979) ..... 13

House Joint Resolution No. 21. *Concerning the Inherent Right of Citizens of this Commonwealth  
to Own and Bear Arms.*, Journal of the House of Delegates, p. 98 (1964). ..... 8

Noah Webster's *American Dictionary of the English Language* (1828)..... 14

Op. Va. Att’y Gen. 118, 119, (1995) ..... 3

Op. Va. Att’y Gen. No. 02-074, (2002) ..... 2

Op. Va. Att’y Gen. No. 04-074, (2004) ..... 5

Tucker, *Blackstone’s Commentaries*, Vol 1. Note A. *Of Sovereignty and Legislature*, (1803) ... 11

Tucker, *Blackstone’s Commentaries*, Vol 1. Note C. *Of The Constitution of Virginia*, (1803)9, 14

Tucker, *Blackstone’s Commentaries*, Vol 5. Note B. *Concerning Treason*, (1803). ..... 7

**REGULATIONS**

4VAC5-30-200 .....2

**CONSTITUTIONAL PROVISIONS**

Va. Const. (1776).....9  
Va. Const. Article I, § 13 ..... passim  
Va. Const. Article I, § 2 ..... 15  
Va. Const. Article I, § 5 ..... 2, 3, 8

**WRITINGS**

3 Elliot's Debates, p. 386 (1836)..... 14  
3 Elliot's Debates, pp. 316-317 (1836)..... 11  
E.F., *Virginia Gazette*, Purdie, No. 68, p.1, May 17, 1776.....9  
George Mason, *Letter to Mr. Brent (1778)*, (Rutland, *The Papers of George Mason*, Vol. I, pp. 433-437. (1970)). ..... 12  
George Mason, *Remarks on Annual Elections for the Fairfax Independent Company, (1775)*. (Rutland, *The Papers of George Mason*, Vol. I, pp. 229-232 (1970))..... 7, 13  
George Mason, *To the Committee of Merchants in London, (1766)*, (Rutland, *The Papers of George Mason*, Vol. I., pp.67-70. (1970)) ..... 9, 15  
Mayer, Henry, *A Son of Thunder, Patrick Henry and the American Republic*, p.102. (1991). .....7

**STATEMENT OF THE NATURE OF THE CASE AND OF THE MATERIAL  
PRECEEDINGS IN THE CIRCUIT COURT**

Mr. DiGiacinto filed suit in Fairfax County Circuit Court to enforce his right to keep and bear arms under the Virginia Constitution Article I, Section 13, and other statutory provisions seeking a declaratory judgment and injunction against the Defendant's regulation. CL20066203. On September 22, 2006, the Honorable Judge Wooldridge of the Circuit Court of Fairfax County without oral argument and solely upon the pleadings, sustained the Commonwealth's plea of sovereign immunity and then sustained the Demurrer and dismissed the case with prejudice and entered final judgment by an Order. This Appeal followed.

**ASSIGNMENTS OF ERROR**

- I. The Circuit court erred in sustaining the plea of sovereign immunity because Va. Const. Article I, § 13, is self-executing and pronounces the sovereign will of the people through their constitution and therefore sovereign immunity has been waived by the people and cannot be invoked.
- II. The Circuit court erred in sustaining the plea of sovereign immunity because the Va. Const. Article I, § 5, declares a separation of powers and under the well established doctrine of judicial review, judicial review is the only protection against legislation which has become unconstitutional as applied and therefore sovereign immunity cannot be invoked.
- III. The Circuit court erred in sustaining the plea of sovereign immunity because a violation of the Va. Const. Article I, § 13, by the Commonwealth constitutes a breach of contract with the people of Virginia and therefore the doctrine of sovereign immunity has been waived and cannot be invoked.
- IV. The Circuit court erred in sustaining the Demurrer and dismissing the case with prejudice because a violation of Mr. DiGiacinto's rights under the Va. Const. Article I, § 13, creates a cause of action for declaratory and injunctive relief under Va. Code § 8.01-184 and Va. Code § 8.01-620.

## QUESTIONS PRESENTED

- I. Whether Va. Const. Article I, § 13, is a self-executing constitutional provision. **(Assignment of Error I.)**
  
- II. Whether the Va. Const. Article I, § 5, declares a separation of powers and under the well established doctrine of judicial review the judicial branch of government shall declare whether a law is unconstitutional, and therefore sovereign immunity cannot be invoked. **(Assignment of Error II.)**
  
- III. Whether the Virginia Bill of Rights is a contract with its people and therefore sovereign immunity cannot be invoked when the Commonwealth breaches the contract. **(Assignment of Error III.)**
  
- IV. Whether a cause of action and an actual antagonistic controversy exists and therefore the case was improperly dismissed. **(Assignment of Error IV.)**

## STATEMENT OF FACTS

Mr. DiGiacinto had previously been told that regulation 4VAC5-30-200 would be enforced and this prompted him to seek and receive two Attorney General opinions upon the subject of the Regulation and Va. Code §18.2-308. *Plaintiff's Memoranda in Opposition to Defendant's Memoranda of Plea of Sovereign Immunity, Demurrer, and Motion to Dismiss*, (Record p. 95). The Attorney General in September 2002 opined that the General Assembly had preempted the field and that the Defendant could not bar valid permit holders from State parks. Op. Va. Att'y Gen. No. 02-074, (2002). In response to this opinion Mr. DiGiacinto tried to enter Leesylvania State Park but was denied access because he announced that he had a concealed handgun and a permit and despite the park ranger's knowledge of the opinion of the Attorney General, he denied Mr. DiGiacinto access to the park. The Defendant later changed its regulation but in so doing legislated through the regulation the manner of carry by permit holders and only

allowed permit holders to carry *concealed* handguns. *Plaintiff's Memoranda in Opposition to Defendant's Memoranda of Plea of Sovereign Immunity, Demurrer, and Motion to Dismiss*, (Record pp. 95-96).

While planning a trip to Douthat State Park in the Spring of 2006, Mr. DiGiacinto found out that the Park's restaurant had an ABC license to serve alcohol for on-premises consumption which bars Mr. DiGiacinto from the premises of the restaurant including the parking lot while carrying a concealed handgun under Va. Code §18.2-308 (J3). This is confirmed by a 1995 opinion of the Attorney General, Op. Va. Att'y Gen. 118, 119, (1995). Mr. DiGiacinto was therefore still barred from the full use and enjoyment of state parks and state park facilities that are open to all citizens of Virginia. This prompted Mr. DiGiacinto to seek a redress of his grievances under Count I of his *Amended Bill of Complaint* (Record p. 48) for declaratory and injunctive relief to enforce his constitutional right to bear arms or the unconcealed/open carry of his firearm(s).

Mr. DiGiacinto asserted through his *Plaintiff's Memoranda in Opposition to Defendant's Memoranda of Plea of Sovereign Immunity, Demurrer, and Motion to Dismiss* the following: That Va. Const. Article I, § 13 is a self-executing constitutional provision (Record p. 93); The Va. Const. Article I, § 5, declares a separation of powers and under the well established doctrine of judicial review the judicial branch of government shall declare whether a law is unconstitutional, and therefore sovereign immunity is inapplicable (Record pp. 91-94); The Virginia Bill of Rights is a contract with its people and therefore sovereign immunity is inapplicable and has been waived when the Commonwealth breaches the contract (Record pp. 92-93), That a cause of action and an actual antagonistic controversy exists and therefore the case was improperly dismissed (Record pp. 94-99). Without oral argument the Judge sustained

the plea of sovereign immunity, the Demurrer and then dismissed the case with prejudice. This case under Article I, §13, of the Virginia Constitution appears to be a case of first impression for the courts of Virginia.

## ARGUMENT

### I. **ARTICLE I, SECTION 13, OF THE VIRGINIA CONSTITUTION IS SELF-EXECUTING AND EXPRESSES THE SOVEREIGN WILL OF THE PEOPLE AND THEREFORE SOVEREIGN IMMUNITY HAS BEEN WAIVED BY THE PEOPLE.**

The Circuit court and the Defendant's (Hereinafter the Commonwealth) reliance on the precedent case of *Virginia Bd. of Medicine v. VPTA*, 13 Va. App. 458, 413 S.E.2d 59 (1991) and other cases that rely on it, was misplaced (Record p. 81). The crux of that case was that under the issues presented no rule or regulation had yet been promulgated. No case decision had been made. It was determined by the circumstances and issues presented that those litigants had to abide by the provisions of the Virginia Administrative Process Act (VAPA) under Va. Code §2.2-4000 *et seq.*, in order to receive a waiver of sovereign immunity. Therefore they could not receive declaratory relief under Va Code § 8.01-184. The current case at bar is different and is distinguishable as it involves a promulgated penal regulation that has the force of law. The regulation is a violation of a self-executing fundamental right enumerated under the Virginia Bill of Rights. Therefore a waiver of sovereign immunity exists outside of the VAPA. Declaratory and injunctive relief is available under Va. Code § 8.01-184 and Va. Code § 8.01-620 to Mr. DiGiacinto.

Article I, §13 of the Virginia Constitution states in part: "That a well regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe

defense of a free state, therefore, the right of the people to keep and bear arms shall not be infringed...” This Article is self-executing both by its negative character and by being a part of the Bill of Rights. *Robb v. Shockoe Slip Found.*, 228 Va. 678, 324 S.E. 2d 674 (1985). A self-executing provision does not require ancillary legislation for its enforcement. Op. Va. Att’y Gen. No. 04-074, (2004).

“A self-executing provision pronounces the will of the people. The will of the people is paramount in determining whether a constitutional provision is self-executing and the modern doctrine favors the presumption that constitutional provisions are intended to be self-operating. This is so because in the absence of such presumption the legislature would have the power to nullify the will of the people expressed in their constitution, the most sacrosanct of all expressions of the people.” *Gray v. Byrant*, Fla. 125 So.2d 846, 851 (1960).

The purpose of the VAPA is to supplement the basic law where the basic law fails to provide process. *School Board v. Nicely*, 12 Va. App. 1051, 408 S.E.2d 545 (1991). It was never created to erect barriers or to replace the fundamental law of the state, the Constitution. When George Mason wrote the Declaration of Rights and the people of Virginia ratified the constitutional provisions, they did not condition the enforcement of Va. Const. Article I, § 13, upon the provisions of the VAPA. The VAPA did not exist. “The purpose and object sought to be attained by the framers of the constitution is to be looked for, and the will and intent of the people who ratified it is to be made effective.” *Dean v. Paolicelli*, 194 Va. 219, 72 S.E.2d 506 (1952). Self-executing provisions by their very nature are directly enforced through declaratory and injunctive relief to invalidate and enjoin unconstitutional statutes or regulations. *Spackman Ex Rel. Spackman v. Board of Educ.*, 16 P.3d 533, 537 (Utah 2000). They are especially used to remedy specific evils prohibited by the constitution.

“It is clear that the due process clause of article I, section 7(a) is self-executing, and that even without any effectuating legislation, all branches of government are required to comply with its terms. Furthermore, it also is clear that, like many other constitutional provisions, this section supports an action, brought against a proper defendant, for

declaratory relief or injunction.” *Katzberg v. Regents of University of Cal.* 58 P.3d 339 (Cal. 2002).

The origin of the individual rights embodied in Article I, §13 of the Virginia constitution has been well documented. In 1623 the laws of the Colony of Virginia made it mandatory to keep and bear arms. 1 *Hening’s Statutes at Large*, p. 127, (1623). That men were required to bring their firearms to church. 1 *Hening’s Statutes at Large*, p.174, (1631). The counties of Accomack-Northampton enforced these laws and enacted their own in 1643 requiring that no person shall travel from house to house without a firearm and ammunition. Ames, Susie M., *County Court Records of Accomack-Northampton, Virginia, 1640-1645*, University Press of Virginia Charlottesville, p. 105, 268 (1973).

When the Colony of Virginia agreed to go back to the total authority of the post English civil war government in 1651, the 13th condition of the compact protected private ownership of arms and ammunition stating the following:

“13thly. That all amunition, powder and arms, other then for private use shall be delivered up, securitie being given to make satisfaction for it.” 1 *Hening’s Statutes at Large*, p. 365, (1651).

George Mason who wrote Section 13 of the Virginia Declaration of Rights knew quite well the origins of the group and individual right to keep and bear arms. As a colonel in the Crown’s militia he was part of a well regulated militia which in Virginia required compulsory service for all free males 16 and over: required them to supply their own arms and ammunition, required them to muster or train at least once a year, required them to submit to the discipline of their commanding officers, allowed them to keep their arms for their own security and the Crown’s service, and to be free from being impressed or seized and allowed for monetary damages for such acts, and that they be ready to repel invasions and insurrections at all times. 3

*Hening's Statutes at Large*, pp. 335-342, (1705), 7 *Hening's Statutes at Large*, pp. 93-116, (1757).

On September 21, 1774, George Mason founded the Fairfax County Independent Company of Volunteers who met at the Alexandria Courthouse. This company was not part of the Crown's militia, and could not have been formed if the keeping and bearing of arms was not required or protected.

“This company is essentially different from a common collection of mercenary soldiers. It was formed upon the liberal sentiments of public good, for the great and useful purposes of defending our country, and preserving those inestimable rights which we inherit from our ancestors; it was intended in these times of extreme danger, when we are threatened with the ruin of that constitution under which we were born, and the destruction of all that is dear to us, to rouse the attention of the public, to introduce the use of arms and discipline, to infuse a martial spirit of emulation, and to provide a fund of officers, that in case of absolute necessity, the people might be the better enabled to act in defence of their invaded liberty. Upon this generous and public-spirited plan, gentlemen of the first fortune and character among us have become members of the Fairfax Independent Company, have submitted to stand in the ranks as common soldiers, and to pay due obedience to the officers of their own choice. This part of the country has the glory of setting so laudable an example:” George Mason, *Remarks on Annual Elections for the Fairfax Independent Company*, (1775). (Rutland, *The Papers of George Mason*, Vol. I, pp. 229-232 (1970)).

The great Virginia patriot and first Governor of Virginia Patrick Henry regularly carried his firearm to the courthouse and appeared at the bar in his short hunting jacket and leather breeches. Mayer, Henry, *A Son of Thunder, Patrick Henry and the American Republic*, p. 102. (1991). The famous Virginia Jurist St. George Tucker wrote : “But ought that circumstance of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself? In many parts of the United States, a man no more thinks of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side.” Tucker, *Blackstone's Commentaries*, Vol 5. Note B. *Concerning Treason*, (1803).

The Supreme court of the new Commonwealth of Virginia in an unrelated case did mention the right to bear arms stating:

“The numerous restrictions imposed on this class of people in our Statute Book, many of 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." *John Aldridge v. The Commonwealth*, 4 Va. 447; Va. (2 Va. Cas.) 447, (1824).

Since the founding of Jamestown, individuals have not only had the right but the duty to keep and bear arms. House Joint Resolution No. 21. *Concerning the Inherent Right of Citizens of this Commonwealth to Own and Bear Arms.*, Journal of the House of Delegates, p. 98 (1964).

“But where 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 (1900). The Commonwealth cannot invoke sovereign immunity to thwart the will of the people through their Constitution. Sovereign immunity has been expressly waived by the people outside the provisions of the VAPA through the self-executing operation of Va. Const. Article. I, § 13. Declaratory and injunctive relief exists outside of the VAPA under Va. Code § 8.01-184 and Va. Code § 8.01-620 for Mr. DiGiacinto.

**II. SOVEREIGN IMMUNITY IS INAPPLICABLE BECAUSE THE VA. CONST. ARTICLE I, § 5 DECLARES THE SEPARATION OF THE BRANCHES OF GOVERNMENT AND THE POWER OF JUDICIAL REVIEW IS THE ONLY PROTECTION WHICH EXISTS AGAINST LEGISLATION WHICH HAS BECOME UNCONSTITUTIONAL AS APPLIED.**

The colonial Virginia government commingled the legislative, judicial and executive branches of government. “I can only find twelve private gentlemen, called counsellors, whose

sanction to our laws is merely farcical; for, as they are creatures of the crown, and removable at pleasure, they never can be considered as a separate branch of government from the crown. Their power is no more than a faint and distant emanation of royalty, which passes through the obscuring medium of a governor; and, when it reaches them, is scarcely darkness visible.” E.F., *Virginia Gazette*, Purdie, No. 68, p.1, May 17, 1776. See also, Tucker, *Blackstone’s Commentaries*, Vol 1. Note C. *Of The Constitution of Virginia*, (1803). George Mason understood this conflict as he wrote ten years earlier in his *To the Committee of Merchants in London*, (1766) : “[t]o defend his property before a Judge, who, from the Nature of his office, is a Creature of the Ministry, liable to be displaced at their Pleasure...” It is with this knowledge of the tyranny of commingled branches of government that George Mason separated them under Section 5 of the Declaration of Rights.

The Virginia Declaration of Rights existed before it became a part of the Constitution when the people of Virginia were forced to live in a state of nature because King George III “abandoned the helm of government and declaring us outside of his allegiance and protection.” Va. Const. (1776). On May 15, 1776, Virginia declared its independence from Great Britain and King George III. A Declaration of Rights of the people was written and then proclaimed on June 12, 1776. “But previous to the promulgating the plan of government, these deputies declared that certain rights were inherent in the people, which the public servants who might be intrusted with the execution of this government, were never to be permitted to infringe;” *Kemper v. Hawkins*, 3 Va. (1 Va. Cases) 20, 24 (1793).

The doctrine of sovereign immunity is grounded in the King’s Prerogative and the common law mainly to protect the public purse, but it has also been said to be a form of public policy to grant immunity from suits in law or equity to “restrain the government from acting or

compel it to act.” *Virginia Bd. of Medicine v. VPTA*, 13 Va. App. 458, 413 S.E.2d 59 (1991). The Virginia Bill of Rights however specifically commands the government to restrain from acting (“Shall not pass any law impairing the obligations of contracts”: “The right of the people to keep and bear arms shall not be infringed”, “Shall not pass any law abridging the freedom of speech”, That general warrants without evidence of a fact are not to be granted, no excessive bail and no cruel and unusual punishment; etc.) and compels it to act (“a well regulated militia, composed of the body of the people, trained to arms”; regular elections, speedy and public trial, trial by twelve impartial jurors, uniform government, etc.). Sovereign immunity cannot shield the government from suit to restrain the government from acting or compel it to act because the Bill of Rights compels the government to restrain from acting against the declared natural rights of the people or individuals.

“In the Bill of Rights many things are laid down, which are reserved to the people; trial by jury, on life and death, liberty of conscience, &c. Can the legislature rightfully pass a law taking away these rights from the people? Can the judiciary pass sentence without a conviction of a citizen by twelve of his peers? Can the executive do anything forbidden by this bill of rights, or the constitution? 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.” *Kemper v. Hawkins*, 3 Va. (1 Va. Cases) 20, 24 (1793).

In *Alden v. Maine* 527 U.S. 706 (1999), it was noted on the history of sovereign immunity:

“The American Colonies did not enjoy sovereign immunity, that being a privilege understood in English law to be reserved for the Crown alone; “antecedent to the Declaration of Independence, none of the colonies were, or pretended to be, sovereign states,” 1 J. Story, *Commentaries on the Constitution* §207, p. 149 (5th ed. 1891)... If a colonial lawyer had looked into Blackstone for the theory of sovereign immunity, as indeed many did, he would have found nothing clearly suggesting that the Colonies as such enjoyed any immunity from suit. “[T]he law ascribes to the king the attribute of *sovereignty*, or pre-eminence,” said Blackstone, 1 W. Blackstone, *Commentaries* (hereinafter Blackstone), and for him, the sources for this notion were Bracton and Acts of Parliament that declared the Crown imperial. *Id.*, at \*241—\*242. It was simply the King against whom “no suit or action can be brought ... even in civil matters, because no court can have jurisdiction over him.” *Id.*, at \*242. If a person should have “a just

demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace though not upon compulsion.” *Alden v. Maine* 527 U.S. 706 (1999).

As Patrick Henry stated in the Virginia Debates on the Federal Constitution:

“For upwards of a century the nation was involved in every kind of calamity, till the Bill of Rights put an end to all, by defining the rights of the people, and limiting the King's prerogative. Give me leave to add (if I can add any thing to so splendid an example) the conduct of the American people. They Sir, thought *a Bill of Rights* necessary.” Patrick Henry, June 12, 1788 , 3 Elliot's Debates, pp. 316-317 (1836).

Sovereign immunity for the Commonwealth of Virginia as a government entity cannot be found in the Declaration of Rights of June 12, 1776, because the government did not exist at the time. The immunity that can be found is for the people or individuals who had been declared to be the only sovereign power and who were immune from certain actions of the government. As St. George Tucker stated in his Commentaries on Blackstone:

“[w]e shall hereafter endeavor to show, the sovereignty of the people, and the responsibility of their servants are principles fundamentally, and unequivocally, established; in which the powers of the several branches of government are defined, and the excess of them, as well in the *legislature*, as in the *other* branches, finds limits, which cannot be transgressed without offending against that greater power from whom all authority, among us, is derived; to wit, the PEOPLE.” Tucker, *Blackstone's Commentaries*, Vol 1. Note A. *Of Sovereignty and Legislature*, (1803).

The people of Virginia were the first to declare and adopt a Declaration of Rights on the Continent, and it is now time for this Court to proclaim that “the Revolution is alive and well in Virginia.”

“To shew you that I have not been an idle Spectator of this great Contest, and to amuse you with the Sentiments of an old Friend upon an important Subject I inclose you a Copy of the first Draught of the Declaration of Rights, just as it was drawn by me, & presented to the Virginia Convention, where it received few Alterations; some of them I think not for the better; this was the first thing of the kind upon the Continent, and has been closely imitated by all the other States... We have laid our new Government upon a broad Foundation, & have endeavoured to provide the most effectual Securties for the essential Rights of human nature, both in Civil and Religious liberty; the People become every Day more & more attach'd to it; and I trust that neither the Power of Great Britain, nor the Power of Hell will

be able to prevail against it.” George Mason, *Letter to Mr. Brent (1778)*, (Rutland, *The Papers of George Mason*, Vol. I, pp. 433-437. (1970)).

The doctrine of sovereign immunity cannot stand as a barrier to citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights. “[I]n determining the rights of citizens under the Declaration of Rights of our Constitution, it is the judiciary’s responsibility to guard and protect those rights...It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the State, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.” *Corum v. University of North Carolina* 413 S.E.2d 276 (N.C. 1992).

The landmark setting case of *Kemper v. Hawkins*, 3 Va. (1 Va. Cases) 20, 24 (1793), established the doctrine of judicial review in Virginia, ten years before *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Judge St. George Tucker opined:

“The interpretation of the laws is the proper and particular province of the courts, A constitution is in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or, in other words, the constitution ought to be preferred to the statutes; the intention of the people to the intention of their agents.” *Kemper v. Hawkins*, 3 Va. (1 Va. Cases) 20, 24 (1793).

Virginia courts do not delegate the task “to say what the law is” to executive agencies. *Finnerty v. Thorton Hall, Inc.* 42 Va. App. 628, 593 S.E.2d 568 (2004). Statutory interpretation “presents a pure question of law subject to de novo review” on appeal. *Mattaponi Indian Tribe v. Commonwealth*, 43 Va. App. 690, 601 S.E.2d 667 (2004). Sovereign immunity is not applicable under the doctrine of judicial review for violations of fundamental constitutional rights, “Because the power of judicial review is the only protection which exists against legislation

which has become unconstitutional as applied”. *Benderson Development Co. v. Sciortino*, 236 Va. 136, 372 S.E.2d 751 (1988).

“Under *Smith*, defendant cannot claim immunity where the plaintiff alleges that defendant has violated its own constitution. Constitutional rights serve to restrict government conduct. These rights would never serve this purpose if the state could use governmental immunity to avoid constitutional restrictions.” *Burdette v. Michigan*, 166 Mich. App. 406, 408 NW2d 185 (1988).

Declaratory and injunctive relief exists outside of the VAPA under Va. Code § 8.01-184 and Va. Code § 8.01-620 for Mr. DiGiacinto.

**III. A VIOLATION OF ARTICLE I, § 13 BY THE COMMONWEALTH CONSTITUTES A BREACH OF CONTRACT WITH THE PEOPLE OF VIRGINIA AND THEREFORE THE DOCTRINE OF SOVEREIGN IMMUNITY HAS BEEN WAIVED AND CANNOT BE INVOKED.**

“What is the Constitution but the great contract of the people, every individual whereof having sworn allegiance to it? A system of fundamental principles, the violation of which must be considered as a crime of the highest magnitude.” *Kamper v. Hawkins*, 3 Va. (1 Va. Cases) 20, 24 (1793). “To protect the weaker from the injuries and insults of the stronger were societies first formed; when men entered into compacts...” George Mason, *Remarks on Annual Elections for the Fairfax Independent Company*, (1775). Compact: “An agreement or contract between persons, nations, or states... A contract between parties, which creates obligations and rights capable of being enforced, and contemplated as such between the parties in their independent characters.” Black’s Law Dictionary, Fifth Edition, p. 255, (1979).

“It is well settled that this constitutional provision is self-executing...The owner whose property is taken or damaged for public use has a right to waive all other remedies and to sue upon an implied contract.” *Burns v. Board of Supervisors*, 218 Va. 625, 238 S.E.2d 823 (1977).

It has been the cherished policy of Virginia since 1778 to allow to its citizens the largest liberty of suit against herself in contract cases even without a self-executing constitutional provision. *Wiecking v. Allied Medical Supply*, 239 Va. 548, 391 S.E.2d 258 (1990). St. George Tucker made note of this 1778 law and wrote: “Any person who is entitled to demand against the commonwealth any right in law or equity, may petition the high court of chancery, or the district court holden in Richmond, according to the nature of his case, for redress, and such court shall proceed to do right therein. But if this right or demand happens to be of a pecuniary nature, it seems to be held that the treasurer cannot pay the party entitled thereto, unless an appropriation for that purpose shall have been first made by the legislature.” Tucker, *Blackstone’s Commentaries*, Vol 1. Note C. *Of The Constitution of Virginia*, (1803).

Noah Webster's *American Dictionary of the English Language* (1828) defines “Infringe” as, “To break, as contracts; to violate, either positively by contravention, or negatively by non-fulfillment or neglect of performance. A prince or a private person infringes an agreement or covenant by neglecting to perform its conditions, as well as by doing what is stipulated not to be done”. The private and public keeping and bearing of arms in colonial Virginia was neither *malum in se* nor *malum prohibitum* but was in fact demanded and encouraged. No type of arm was prohibited by law and no place was off limits to the bearing of arms by law. "The great object is, that every man be armed." Patrick Henry, June 14, 1788, 3 Elliot's Debates, p. 386 (1836).

To infringe upon a citizen’s right to keep and bear arms is a violation of the great contract of the people of Virginia where the Commonwealth or its agents have been forbidden to act by the sovereign will of the people. The Commonwealth may not claim the power, allegiance, or protection of a King because the People are sovereign. Allegiance and protection are

necessarily reciprocal duties of the master (the People) and the servant (the Commonwealth). Va. Const. Article I, § 2. “[a]nd we own too, that Protection & Allegiance are reciprocal Dutys.” George Mason, *To the Committee of Merchants in London*, (1766), (Rutland, *The Papers of George Mason*, Vol. I., pp.67-70. (1970)). The Commonwealth may not declare the people outside the protection of their own Constitution, because to do so would relieve the people of any contractual duty of allegiance to the Commonwealth. The great contract of the people must be enforced against the Commonwealth.

Sovereign immunity can not be invoked for breach of contract and therefore declaratory and injunctive relief exists outside of the VAPA under Va. Code § 8.01-184 and Va. Code § 8.01-620 for Mr. DiGiacinto.

#### **IV. A VIOLATION OF MR. DIGIACINTO’S RIGHTS UNDER THE VIRGINIA CONSTITUTION ARTICLE I, § 13 CREATES A CAUSE OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF.**

Because sovereign immunity is inapplicable or has been waived outside of the Virginia Administrative Process Act for Mr. DiGiacinto, the Circuit Court incorrectly sustained the plea of sovereign immunity, the Demurrer and therefore incorrectly dismissed the case. An actual antagonistic controversy or denial of right exists and therefore Mr. DiGiacinto may bring this case before the Circuit Court under Va. Code § 8.01-184. and Va. Code § 8.01-620 for proper adjudication. “[w]here the remedy at law is not as complete and as fully adequate as an injunction suit, or where the threatened or attempted enforcement of a void statute or ordinance will do irreparable injury to a person in interfering with the exercise of such a common fundamental personal right, a suit for injunction will lie.” *Thompson v. Smith*, 155 Va. 367, 154 S.E. 579 (1930).

**CONCLUSION**

This case involves significant constitutional issues and other issues of law. Mr. DiGiacinto respectfully requests that this appeal be granted.

Respectfully Submitted

By: \_\_\_\_\_  
Rudolph DiGiacinto  
Appellant, *Pro se*

**CERTIFICATE**

1. The Name and Address of Appellant, *Pro Se* is:

Rudolph DiGiacinto  
8344 Darlington Ct.  
Springfield, VA 22152

The Name of Appellee is Virginia Department of Conservation and Recreation. Counsel for Appellee is:

Mr. David C. Grandis VSB#47746  
Assistant Attorney General  
900 East Main Street  
Richmond, Virginia 23219

2. I certify that Seven copies of this Petition for Appeal have been filed and one copy mailed or delivered to opposing counsel on or before the date of filing.

3. I hereby certify that a true copy of the Petition for Appeal, was mailed to counsel for the Defendant in this matter, Mr. David C. Grandis, Assistant Attorney General, Office of the Attorney General, 900 East Main Street, Richmond, Virginia 23219, by first class mail, postage prepaid, on January \_\_\_\_\_, 2007.

4. 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.

---

Appellant, *Pro Se*.