**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**GAINESVILLE DIVISION**

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| BRADY CENTER TO PREVENT GUN VIOLENCE<br><br>Plaintiff,<br><br>versus<br><br>CITY OF NELSON, GEORGIA,<br><br>MR. JONATHAN BISHOP, in his official capacity as Mayor Pro Tempore of the City of Nelson, Georgia,<br><br>MR. DUANE CRONIC,<br>MR. JACKIE JARRETT,<br>MRS. EDITH PORTILLO,<br>MRS. MARTHA TIPTON, in their official capacities as members of the City Council of Nelson, Georgia<br><br>Defendants. | Civil Action No. 2:13-cv-104-WCO<br><br>**PLAINTIFF'S OPPOSITION TO GEORGIACARRY.ORG'S MOTION TO INTERVENE** |

Plaintiff Brady Center to Prevent Gun Violence (hereinafter, "Plaintiff" or "Brady Center") opposes GeorgiaCarry.org's (hereinafter, "GeorgiaCarry" or "Purported Intervenor") motion to intervene. *See* Mot. to Intervene (Dkt. 14). Notwithstanding clear precedent requiring that a purported intervenor identify a protectible *legal* interest, GeorgiaCarry's motion fails to identify anything beyond an academic, speculative interest in the outcome of this case. That is insufficient

to support intervention as of right. Nor can GeorgiaCarry identify any reasonable basis for permissive intervention other than a desire to inject into this litigation questions about the appropriate interpretation of a Georgia statute, O.C.G.A. § 16-11-173. But that statute is cited *nowhere* in the Complaint *or* in the Defendants' Answer. That is insufficient to support permissive intervention.

## FACTS AND PROCEDURAL HISTORY[1]

Plaintiff Brady Center brings this lawsuit on behalf of its members to challenge as unconstitutional an ordinance that requires certain individuals living in the City of Nelson to purchase and maintain a firearm with ammunition (the "Firearm Ordinance").[2] Compl. ¶ 2 (Dkt. 1). The Firearm Ordinance violates the First, Second, and Fourteenth Amendments of the United States Constitution. *Id.* ¶¶ 39-65. The Plaintiff has named the City of Nelson and certain city officials as defendants (collectively, "the City" or "Defendant"). *Id.* ¶¶ 18-23. The Complaint does not invoke state law. *See generally id.* The Answer nowhere invokes O.C.G.A. § 16-11-173. *See generally* Answer (Dkt. 18).

[1] The Court should disregard any factual statements in GeorgiaCarry's brief as it has failed to comply with Local Rule 7.1 requiring an affidavit or declaration to support any factual statements.

[2] *See* Decl. of Daniel Valencia In Supp. of Pl.'s Opp'n to GeorgiaCarry.org's Mot. to Intervene (hereinafter "Valencia Decl.") at Ex. 1, filed herewith.

On June 10, 2013, GeorgiaCarry filed a "Motion to Intervene" attaching "Intervenor's Motion to Dismiss."[3] GeorgiaCarry is an advocacy group targeting creation of an unrestricted "right to own and carry the firearm of [one's] choice."[4] The Eleventh Circuit has held that GeorgiaCarry's arguments to that end would "destroy one cornerstone of liberty." *GeorgiaCarry.org., Inc. v. Ga.*, 687 F.3d 1244, 1265 (11th Cir. 2012) , *cert denied*, 133 S. Ct. 856 (2013). That is because GeorgiaCarry seeks to "abrogate[] the right of a *private* property owner" in that case a church "to determine for itself whether to allow firearms on its premises." *Id*. at 1266 (emphasis in original). That is inconsistent with the Constitution. *Id.*

## ARGUMENT

### I. GeorgiaCarry Lacks an Interest Warranting Intervention as of Right.

GeorgiaCarry fails to meet the elements required for intervention as of right because it has no substantial, direct, legally protectible interest in this proceeding. To intervene as of right, GeorgiaCarry must show (1) that it "claims an interest relating to the property or transaction that is the subject of the action," (2) that it is "so situated that disposing of the action may as a practical matter impair or impede

[3] As the motion to intervene has not been granted and the motion to dismiss not formally docketed, any opposition to the purported motion to dismiss would be premature and inappropriate. In the event that the motion to intervene is granted, Plaintiff will oppose the motion to dismiss on the timetable set forth in the Rules or otherwise set by the Court after such a motion is formally filed and docketed.

[4] *See* Valencia Decl., Ex. 2.

the movant's ability to protect its interest," and (3) that the "existing parties [do not] adequately represent that interest." *See* Fed. R. Civ. P. 24(a)(2); *Athens Lumber Co. v. Fed. Election Comm'n*, 690 F.2d 1364, 1366 (11th Cir. 1982) ("[i]ntervention of right must be supported by direct, substantial, legally protectible interest in the proceeding.") (citation and internal quotation marks omitted). GeorgiaCarry does not meet and cannot meet any of these requirements.

### A. GeorgiaCarry Lacks Any Legally Protectible Interest in This Proceeding.

The Eleventh Circuit has held that "the intervenor must be ***at least a real party*** in interest in the transaction which is the subject of the proceeding." *Id.* (emphasis added). As this Court has explained, "[b]y requiring that the applicant's interest be 'legally protectible,' it is plain that something more than an economic interest is necessary." *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 326 (N.D. Ga. 1993) (citation omitted). GeorgiaCarry's motion fails to identify any legally protectible interest. It does not allege that it is a real party in interest because it is not. GeorgiaCarry has not shown or even alleged any economic interest in the outcome of this litigation. Nor has GeorgiaCarry shown any specific connection to the City of Nelson or its residents. This utter failure of proof puts an end to the inquiry. The motion should be denied.

Instead of coming forward with a legally protectible interest, GeorgiaCarry attempts to distract the Court by discussing a state statute, O.C.G.A. § 16-11-173,

that is wholly unrelated to this case. This statute, which GeorgiaCarry references in its papers as "the Firearms Preemption Statute," was not cited in Plaintiff's Complaint nor was it cited in Defendants' Answer. *See generally* Compl. and Answer.

According to GeorgiaCarry:

> [GeorgiaCarry] frequently litigates issues relating to the meaning and enforcement of the Firearms Preemption Statute and therefore has a vested interest in seeing to it that the Firearms Preemption Statute is consistently applied and vigorously defended.

Mot. to Intervene at 2. Frequent litigation of an issue alone has never been sufficient to create an "interest relating to the property or transaction" required by Rule 24(a)(2), and GeorgiaCarry has cited no precedent to the contrary. An academic interest in the interpretation of a law — as opposed to a legally protectible interest — is insufficient to warrant intervention. *See Keith v. Daley*, 764 F.2d 1265, 1270 (7th Cir. 1985) (anti-abortion organization did not have a sufficient interest to intervene in an action challenging a statute it lobbied to create). An academic interest, however, is all GeorgiaCarry's purportedly vested interest in the Firearm Preemption Statute amounts to. Such interests, while academically interesting, are insufficient to support intervention as of right. *See Coal. to Defend Affirmative Action v. Granholm*, 501 F.3d 775, 782 (6th Cir. 2007) (denying intervention where alleged interest amounted to no more than a "general ideological interest").

### B. GeorgiaCarry Cannot Meet the Remaining Requirements for Intervention as of Right.

**First**, because GeorgiaCarry cannot claim an interest in this proceeding, disposing of the action will not "impair" its "ability to protect its interest." Fed. R. Civ. P. 24(a)(1). Disposition of this case will not affect GeorgiaCarry's stated but nonetheless academic interest in O.C.G.A. § 16-11-173. The only potentially relevant provision of that statute provides that "[n]othing contained in this Code section shall prohibit" the type of Firearm Ordinance passed by Nelson. Plaintiff nowhere asserts that Nelson's Firearm Ordinance violates O.C.G.A. § 16-11-173. Defendant nowhere relies on that statute to defend the constitutionality of the Firearm Ordinance. Nor could it. *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause). The concern that this case may somehow impair GeorgiaCarry's (non-protectible) interest in O.C.G.A. § 16-11-173 amounts to unsupported speculation. That is insufficient to support intervention as of right.

**Second**, because GeorgiaCarry has no interest in this proceeding, it has no interest that requires representation. Assuming, contrary to fact and solely for the purposes of argument that GeorgiaCarry has a legally protectible interest in upholding Nelson's Firearm Ordinance, then GeorgiaCarry's interest is aligned with the interest of the City. GeorgiaCarry has failed to come forward with any evidence in the record showing, or even suggesting, that the City cannot adequately represent any alleged interest of GeorgiaCarry. *See Cont'l Graphic*

*Servs., Inc. v. Cont'l Cas. Co.*, 681 F.2d 743, 745 (11th Cir. 1982) ("[Purported Intervenor] seeks precisely the result urged by [Plaintiff]. . . . He may not, therefore, intervene as of right"). GeorgiaCarry argues that "***[i]t is entirely possible*** that Defendants would advocate for the validity of the [O.C.G.A. § 16-11-173] in ways harmful to Intervenor's interest." Mot. to Intervene at 6 (emphasis added). As GeorgiaCarry's use of the phrase "entirely possible" demonstrates, its motion relies on unvarnished speculation. *See Aref v. Holder*, 774 F. Supp. 2d 147, 172 (D.D.C. 2011) (intervenor is required "produce something more than speculation as to the purported inadequacy" of representation). That is insufficient to support intervention as of right, and the motion should be denied.

## II. The Motion for Permissive Intervention is Infirm.

GeorgiaCarry's motion fails to identify any legally valid reason justifying permissive intervention. Indeed, the only justification GeorgiaCarry can cite is its academic interest in O.C.G.A. § 16-11-173. But, that law has no role in this case.

*Stallworth v. Monsanto Co.*, a decision nowhere mentioned in GeorgiaCarry's motion, established the standard for evaluating a request for permissive intervention. 558 F.2d 257, 269 (5th Cir. 1977).[5] That case requires courts to follow a "two-stage" inquiry in ruling on motions for permissive

[5] Decisions of the Fifth Circuit prior to September 30, 1981, are binding precedent in the Eleventh Circuit. *Collegiate Licensing Co. v. Am. Cas. Co. of Reading, Pa.*, 713 F.3d 71, 81 n.4 (11th Cir. 2013).

intervention. *Id*. First, the purported intervenor must show "a claim or defense and the main action have a question of law or fact in common." *See id*.; Fed. R. Civ. P. 24(b)(1)(B). That threshold inquiry is a question of law. *Id*. Until and unless that threshold showing is made, the Court cannot exercise its discretion. *See Stallworth*, 558 F.2d at 269 ("***If*** this threshold requirement is met, ***then*** the district court must exercise its discretion in deciding whether intervention should be allowed") (emphasis added).

Here, GeorgiaCarry cannot show that it has "a … defense that shares with the main action a common question of law or fact." First, "defense" in the context of Rule 24(b)(1)(B) means a defense to a potential claim against the intervenor. *See Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525 (5th Cir. 1994) (denying intervention where "***applicant's claim or defense*** and the main action [did not] share common questions of law or fact.") (emphasis added). The requirement of having "a defense" is not satisfied by merely asserting that there exists a legal argument that defendant could make in response to plaintiff's claim. If that were the threshold, anyone with an academic interest in a case, or anyone who thinks a case is not being effectively litigated would be in the position to seek permissive intervention. *See Abney v. ITT Diversified Credit Corp. (In re Envtl. Elec. Sys. Inc.)*, 11 B.R. 962, 964 (Bankr. N.D. Ga. 1981) (denying permissive intervention because "[m]ovant has not asserted a claim or defense against [defendant] which

has questions of law or fact in common with the main action. He has only asserted an interest in the outcome of this case.").

GeorgiaCarry's basis for permissive intervention is limited to the assertion that it has "an interest in seeing that the Firearm Preemption Statute is constitutional" and that it has "an interest in seeing the Second Amendment correctly applied." Mot. to Intervene at 6-7. That is an academic interest. It is not a claim and it is not a defense. GeorgiaCarry has failed to identify any common question of law or fact **shared** with the main action. The motion is for that reason infirm.

Rule 24(c) requires, among other things, that the "motion [to intervene] must . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought." Fed. R. Civ. P. 24(c). Courts have repeatedly held that a purported intervenor must attach as a part of its motion to intervene a complaint in intervention or an answer in intervention. *See Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584 (7th Cir. 1993); *SEC v. Investors Sec. Leasing Corp.*, 610 F.2d 175 (3d Cir. 1979); *Spangler v. Pasadena City Bd. of Educ.*, 552 F.2d 1326 (9th Cir. 1977). Courts sometimes excuse this requirement based on the liberal application of the Federal Rules. *E.g.*, *Piambino v. Bailey*, 757 F.2d 1112 (11th Cir. 1985). Liberality, however, cannot take the place of evidence, and here, the record is devoid of any evidence that GeorgiaCarry has a claim or defense shared

with the main action. Absent the inclusion of a pleading in intervention, this Court need not attempt to divine a common question of law or fact that would support intervention. The motion should be dismissed out of hand based on procedural non-compliance and substantive infirmity.

Even if GeorgiaCarry could make that showing (absent here), permissive intervention is discretionary. *See Athens Lumber Co.*, 690 F.2d 1364 at 1367. After the threshold showing is made, the Court may, in exercising its discretion, consider such factors as the nature and extent of the applicant's interests, "the degree to which those interests are adequately represented by other parties, and whether parties seeking intervention will significantly contribute to . . . the just and equitable adjudication of the legal question presented." *H.L. Hayden Co. v. Siemens Med. Sys., Inc.*, 797 F.2d 85, 89 (2d Cir.1986) (citation and internal quotation marks omitted). As demonstrated above, GeorgiaCarry has no legal interest in this case and any interest, to the extent one exists, will be adequately represented by the City of Nelson. Regardless of how this Court disposes of this action, GeorgiaCarry will not gain or suffer any injury to any legally protectible interest.

Permitting GeorgiaCarry to intervene would prejudice plaintiff by allowing a stranger to the case to inject new, unrelated, irrelevant legal issues. GeorgiaCarry's repeated references to O.C.G.A. § 16-11-173 demonstrate that it

will seek to drive issues about that statute into this case for its own ends. Mot. to Intervene at 2-7. GeorgiaCarry should not be permitted to enter this litigation for the purpose of obtaining rulings about its favorite statute. *See Manasota-88, Inc. v. Tidwell*, 896 F.2d 1318, 1323 (11th Cir. 1990) ("Appellant seeks to inject numerous issues into the case… and intervention . . . would severely protract the litigation . . . ."). Doing so would, to Plaintiff's detriment, add unnecessary cost to this litigation. Moreover, adding a party — particularly one with its own agenda — would impair the potential for a prompt, consensual resolution of the case.

## CONCLUSION

For the foregoing reasons, GeorgiaCarry's motion to intervene should be denied.

DATED this 27th day of June, 2013.

Respectfully submitted,

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**LOCAL RULE 7.1 CERTIFICATION OF COMPLIANCE**

Pursuant to Local Rule 7.1(D), counsel for Plaintiff certifies that the foregoing document has been prepared in Times New Roman 14-point font, in compliance with Local Rule 5.1(C).

s/ Peter C. Canfield
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**CERTIFICATE OF SERVICE**

I hereby certify that on June 27, 2013, I electronically filed the foregoing PLAINTIFF'S OPPOSITION TO GEORGIACARRY.ORG'S MOTION TO INTERVENE with the Clerk of Court using the CM/ECF system which will automatically send email notification of filing to all counsel of record.

DATED this 27th day of June, 2013.

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