STATE COURT OF BIBB COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,	)	
Plaintiff	)	
	)	Case No. 352362
vs.	)	
	)	
BRANT BRINSON,	)	
Defendant	)	

BRIEF OF *AMICUS CURIAE* GEORGIACARRY.ORG, INC. IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Introduction

The State has accused Defendant of violating O.C.G.A. § 16-11-127 (2008), which prohibited carrying a deadly weapon to a public gathering[1]. Because the place in question was not a public gathering, and because an application of the statute against Defendant under the circumstances violates Defendant's fundamental constitutional right to bear arms, the Accusation must be dismissed.

Interest of *Amicus Curiae*

GeorgiaCarry.Org, Inc. ("GCO") is a non-profit corporation organized under the laws of the State of Georgia. Its primary purpose is to foster the rights of its members to keep and bear arms. A secondary purpose of GCO is to provide public information and education regarding gun laws and gun safety. Defendant is not a member of GCO, so GCO's interest in this case is to provide the court with information to assist it in making a proper and just decision.

[1] The "public gathering law" has been repealed and the crime of carrying a deadly weapon to a public gathering no longer exists. See Senate Bill 308 from the 2010 session of the General Assembly.

Background

On May 29, 2008, Defendant was stopped by the Macon Police as he drove into the parking lot of the Rosa Jackson Center in the City of Macon, Georgia.[2] The stop occurred at approximately 7 p.m. According to the U.S. Naval Observatory, sunset in Macon that day occurred at 8:36 p.m., so it was still daylight. http://aa.usno.navy.mil/cgi-bin/aa_pap.pl. Police stopped Defendant because Defendant allegedly was playing loud music in his car. As police began questioning Defendant, they observed a rifle on the passenger seat of Defendant's car. They immediately placed Defendant under arrest for violating O.C.G.A. § 16-11-127 (2008).

According to the City of Macon Parks and Recreation Department, the Rosa Jackson Center is a park containing picnic, playground, and athletic facilities. http://www.macon-bibbcountyparksandrecreation.com/Parks/Rosa_Jackson.htm Neither the police report nor the Accusation claim that any special event was taking place in the park at the time of the incident, nor do they state that Defendant was attending an event.

Argument

I. The Park is Not a Public Gathering

The State appears to assume that the Rosa Jackson Center's parking lot is a public gathering *per se*. It is not. Former O.C.G.A. § 16-11-127(b) stated, in pertinent part, that a "public gathering" includes but is not limited to:

> "[A]thletic or sporting events, schools or school functions, churches or church functions, political rallies or functions, publicly owned or operated buildings, or establishments at which alcoholic beverages are sold for consumption on the premises.

[2] Except as otherwise noted, the facts of the case in this Brief are taken from the police report. GCO has not conducted any independent investigation of the facts but is taking the police report to be correct for the purposes of this Brief.

Clearly, the parking lot of a city park does not fit the description of any of the enumerated locations. Rosa Jackson Center's parking lot can only be a public gathering, therefore, if it otherwise fits the phrase "public gathering."

The Court of Appeals has clarified for Georgians how to determine if a particular location is a public gathering. "[T]he focus is not on the 'place' but on the 'gathering' of people…. [A]ppellee's possession of a weapon and mere presence in a public place did not constitute a violation of O.C.G.A. § 16-11-127." *State v. Burns*, 200 Ga.App. 16, 17 (1991). The *Burns* court elaborated that a public gathering is not a place where the public lawfully gathers, because that could be any public place and would make it a crime to carry a weapon in public. *Id.* at 16. Instead, the focus is on "when people *are* gathered or will be gathered for a particular function and not when a weapon is carried lawfully to a public place, where people *may* gather." *Id.* [Emphasis in original].

Applying *Burns* to the instant case, Defendant drove into the parking lot of a park. He did not get out of his car (until he was detained by police) and did not carry the firearm on his person. There is no indication that people were gathered would be gathered in the parking lot ***for a particular event.*** The police report describes the traffic as "light" on that Thursday evening. Defendant had no reason to believe people would gather in the parking lot of a park when then-existing conditions were that people were not gathered. Defendant was entitled to rely on *Burns* and lawfully carry a rifle in his car.

II. The Statute Violates Defendant's Right to Bear Arms

Even if the Court somehow concludes that the parking lot of the park was a public gathering, the application of the public gathering law against Defendant in these

circumstances violates Defendant's federal constitutional right to bear arms. The Second Amendment provides:

> A well-regulated militia being necessary for the security of a free state, the right of the people to keep and bear arms shall not be infringed.

The Supreme Court of the United States has ruled that the provisions of the 2nd Amendment apply to the states via the Due Process Clause of the 14th Amendment. *McDonald v. City of Chicago,* 130 S.Ct. 3020 (2010) ("In sum, it is clear that the framers and ratifiers of the Fourteenth Amendment counted the rights to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.")

The Supreme Court also has ruled that the 2nd Amendment guarantees a fundamental constitutional right. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2798 ("By the time of the founding, the right to have arms had become fundamental…."). The *Heller* court also declared the right to keep ***and bear*** arms to be "an individual right to possess weapons in case of confrontation." *Id.* at 2797.

The Supreme Court of the United States has not announced a standard of review for evaluating infringements on the Second Amendment, but it has declared that rational basis is not appropriate. *Heller,* 128 S.Ct. at 2818. The appropriate standard, therefore, is either intermediate scrutiny or strict scrutiny. Neither the 11th Circuit nor any other Circuit Court of Appeals has announced a standard of review for Second Amendment cases. Perhaps the most thorough discussion of the topic comes from the Third Circuit. In *United States v. Marzzarella,* 2010 U.S. App. LEXIS 15655, No. 09-3185 (3rd Cir., July 29, 2010). In *Marzzarella,* the Court discussed both the appropriate methodology for analyzing Second Amendment challenges to statutes and the standard of review:

> First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee…. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

2010 U.S. App. LEXIS 15655, 6.

The initial inquiry for the instant case, then, is whether carrying arms in a motor vehicle in the parking lot of a city park is protected by the right to bear arms. *Marzzarella* instructs that the carrying of weapons of the kind commonly owned by law-abiding citizens is protected by the Second Amendment, with limited exceptions. 2010 U.S. App. LEXIS 15655, 9.

Defendant is accused of possessing the most ubiquitous and commonly owned rifle in the world: an AK-47. It is clear, therefore, that Defendant's possession of the rifle is protected by the 2nd Amendment.

The only conceivably-applicable exception is that carrying of weapons in "sensitive places" is not covered by the Second Amendment. This is so because the right to bear arms as known at the Founding had been restricted from certain places at common law. For example, Queen Elizabeth I banned handguns within two miles of the monarch after William of Orange was assassinated with a handgun in 1584. Jamison, K.L., "Sensitive Areas," *Concealed Carry,* Volume 7, Aug/Sept 2010. The *Heller* Court stated in *dicta* that schools and government buildings are "sensitive places." Government buildings are no doubt the descendant of the location of the monarch. It is not clear how schools achieved "sensitive" status.

There is no basis for concluding that the parking lot of a city park is a "sensitive place." The Supreme Court listed but two places that qualify as 'sensitive," government

buildings and schools. The State has recently argued in a civil case that "sensitive places" are places where dangerous materials or people are stored (nuclear power plants and jails) or where people's judgment is impaired (mental health facilities and bars). *See Document 21 – Supplemental Brief of Defendants State of Georgia and Governor Sonny Perdue in Support of Their Motion to Dismiss,* p. 5, *GeorgiaCarry.Org, Inc. v. State of Georgia,* (U.S. Dist. Ct. for the Middle Dist. Of Ga., No 5:10-cv-302-CAR, filed September 22, 2010). A copy of the State's brief is attached to this Brief as Exhibit A for the Court's convenience. The State also appeared to argue that sensitive places are where constitutional rights are exercised, but they conceded that that test cannot be applied universally.

The State cannot seriously expect to argue in the instant case that a car in the parking lot of a city park is a place where dangerous materials or people are kept or where people are impaired. The "place where people exercise constitutional rights argument" is a non-starter. Plenty of places where people go to exercise constitutional rights are not off-limits to firearms, never have been, and constitutionally never could be. For example, newspaper offices, public squares, abortion clinics, and private homes all are places where people go to exercise fundamental constitutional rights (freedom of the press, freedom of speech, right to privacy, and right to be left alone and to be free from unreasonable searches and seizures, respectively). None of these is an example, however, of a place where firearms are prohibited. Indeed, if *Heller* stands for any proposition at all it surely stands for the proposition that the state may not ban firearms in private homes. Given that *Marzzarella* observes, "prudence counsels caution when extending these recognized exceptions to novel regulations unmentioned by *Heller,*" it is

abundantly clear that a car in the parking lot of a city park is not a place similar enough to government buildings and schools to qualify as a "sensitive place" under *Heller*.

Returning to the *Marzzarella* analysis, it is clear the right to carry firearms in one's car, even while driving in the parking lot of a city park, is protected by the Second Amendment. *Marzzarella* explains the process for determining which heightened level of scrutiny to apply (rational basis was rejected by *Heller*) by analyzing the Second Amendment similarly to the First Amendment. *Marzzarella* concludes that a law that severely limits the right must be subject to strict scrutiny, while a law that only affects possession of a narrow class of firearms is subject to intermediate scrutiny. The Court concluded that the District of Columbia's handgun ban in *Heller* would have been subject to strict scrutiny (if the Supreme Court had selected a standard), but the ban on obliterated serial numbers (at issue in *Marzzarella*) was subject only to intermediate scrutiny.

If the public gathering law is applied to ban all firearms in the car in the parking lot of a city park, it is a complete ban and is subject to strict scrutiny. Under strict scrutiny, the law must be narrowly tailored to achieve a compelling governmental interest. *McTernan v. City of York*, 564 F.3d 636, 647 (3rd Cir. 2009). GCO doubts the State can articulate its compelling interest in keeping firearms out of private automobiles, especially given the very expansive language in the current law permitting just such behavior. O.C.G.A. § 16-11-126 (2010).

Even if there were a compelling governmental interest in keeping firearms out of private passenger automobiles in the parking lots of city parks, the law would have to be narrowly tailored to achieve that interest. A blanket ban can hardly be described as

narrowly tailored. Given that a blanket ban would severely restrict the ability to carry a firearm when one travels, a primary purpose of the 2nd Amendment (to carry firearms for self-defense in case of confrontation) would be frustrated.

Conclusion

A car in the parking lot of a park is not a public gathering under the now-repealed public gathering law. Even if it were, application of the public gathering law to Defendant under the circumstances of this case violates Defendant's constitutional right to be bear arms. For these reasons, this case should be dismissed.

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CERTIFICATE OF SERVICE

I certify that on October 22, 2010, I served a copy of the foregoing via U.S. Mail upon:

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_____
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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

GEORGIACARRY.ORG, INC., et al.,	
Plaintiffs,	
v.	CIVIL ACTION NO. 5:10-cv-00302-CAR
THE STATE OF GEORGIA, et al.,	
Defendants.	

SUPPLEMENTAL BRIEF OF DEFENDANTS STATE OF GEORGIA AND GOVERNOR PERDUE IN SUPPORT OF THEIR MOTION TO DISMISS

Come now the State of Georgia and Governor Sonny Perdue, Defendants in the above-styled action, by and through counsel, pursuant to the direction of this Court, and submit this supplemental brief in support of their motion to dismiss (Doc. 9). Defendants rely on their previous submissions (Doc. 9-2; Doc. 10) and will attempt not to repeat them, however clarity will require some repetition.

Federal courts should be slow to declare a state statute unconstitutional. *Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663, 667 (11th Cir. 1984). "The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. Calif.*, 155 U.S. 648, 657 (1895); *see also Frisby v. Schultz*, 487 U.S. 474, 483 (1988) (directing federal

courts to construe state statutes to "avoid constitutional difficulties"). When assessing the constitutionality of a statute, it "must be read as a whole." *Woodard v. Wainwright*, 556 F.2d 781, 785 (5th Cir. 1977).

A. The Statute is not unconstitutionally vague

At the hearing, the Court asked the parties to address the issue of whether the Statute is unconstitutionally vague in its use of the words "place of worship." Defendants contend that the phrase is not vague but merely generic.[1]

A criminal statute must define the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). A vague law lacks standards, and thus, "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

The words "place of worship" describe the entire building in which a religious congregation meets as opposed to manifesting an intention to distinguish between, for example, a chapel and a secretary's office. This is supported by the

[1] Plaintiffs agree with this assertion, stating in their preliminary injunction brief that "'[p]lace of worship' is clear, unambiguous . . . ." (Doc. 6-2 at 8).

Statute itself. For example, the Statute explicitly excludes from its coverage "parking facilities" at the otherwise covered locations. O.C.G.A. § 16-11-127(d)(3). If the Statute were intended to cover only church sanctuaries and other similar rooms, then the parking facility exception would not be necessary. Additionally, the Statute uses the language "in a place of worship" in the same sense that it uses "in a government building" and "in a courthouse," suggesting that the phrases should be interpreted in the same manner to refer to the entire building and not only to certain rooms. *Compare id.* § 16-11-127(b)(4) *with id.* § 16-11-127(b)(1) and (2).

The general "place of worship" language was chosen by the General Assembly in an effort to be inclusive without being verbose. "Place of worship" refers to the buildings of all faiths, and thus, is arguably less confusing than the prior version of the Statute which forbade weapons at "public gatherings," including "churches or church functions," which might be construed as applying only to Christian religious facilities and functions. *See, e.g.,* Mirriam-Webster's Collegiate Dictionary, Eleventh Edition (2004) (defining "church" primarily as a Christian term). By choosing the more generic "place of worship," the General Assembly indicated its intent to provide the same manner of protection to all religions. The Statute is not vague; it is simply broad. *See United States v. Griffin*,

589 F.2d 200, 206 (5th Cir. 1979) (breadth does not render a statute unconstitutionally vague).

B. The Statute is a valid enactment under the Second Amendment

Defendants' arguments on the appropriate level of scrutiny and the constitutionality of the Statute are largely addressed in their initial brief. (Doc. 9-2 at 14-24). A survey of the post-*Heller* decisions of the lower courts concerning firearm restrictions does not reveal any that applied strict scrutiny. Most do not discuss the level of scrutiny, but those that do have consistently applied a more moderate level of review. *See United States v. Williams*, ___ F.3d ___, 2010 WL 3035483 (7th Cir. 2010) (applying intermediate scrutiny to felon-in-possession ban); *see also* cases cited previously at Doc. 9-2 at 17.

Applying intermediate scrutiny here is in line with the Supreme Court's pronouncement that restrictions on the possession of firearms in "sensitive places" are "presumptively lawful," and thus, that strict scrutiny is not appropriate for this class of gun regulations. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2817 and n.26 (2008); *see also McDonald v. City of Chicago*, 130 S.Ct. 3020, 3047 (2010) (reiterating that *Heller* and *McDonald* do "not cast doubt on such longstanding regulatory measures"). Plaintiffs' only real response is to argue that places of worship are not "sensitive places" because, unlike government buildings and

schools, they were not specifically included in the list of such places set forth in the *Heller* decision. The *Heller* Court, though, stated that "[w]e identify these presumptively lawful regulatory measures only as examples; *our list does not purport to be exhaustive*." *Id.* at n.26 (emphasis added).

Every location at which the Statute restricts weapon-carrying qualifies as "sensitive" in one way or another.[2] Jails, prisons, and nuclear power facilities present safety concerns based on the persons or materials situated there, and thus, are "sensitive" because of the extra dangers related to weapons on those premises. O.C.G.A. § 16-11-127(b)(3) and (7). Mental health facilities and bars contain persons whose judgment and inhibitions may be impaired, and accordingly, weapons possession at those locations raises extra safety concerns. O.C.G.A. § 16-11-127(b)(5) and (6). Fully half of the locations, however, are places where fundamental constitutional rights are exercised. O.C.G.A. § 16-11-127(b)(1), (2), (4), and (8); *see also* Doc. 9-2 at 18-19 and n.4 (discussing the primacy of each of these locations and associated rights within our constitutional scheme).

Plaintiffs suggest that giving places of worship this extra protection "is a blatant violation of the Establishment Clause." (Doc. 12 at 22). Leaving aside the fact that neither the Complaint nor the Amended Complaint raises an

[2] Nothing in *Heller* suggests that there is only one reason why a "sensitive place" might be deemed "sensitive."

Establishment Clause claim, the law is clear that "[s]ingling out free exercise rights for protection is not an impermissible endorsement of religion." *Benning v. State of Ga*, 391 F.3d 1299, 1310 (11th Cir. 2004).

For the reasons Defendants previously argued (Doc. 9-2 at 18-20), it is clear that the Statute is constitutional under intermediate scrutiny because it is substantially related to multiple important governmental objectives. Deterring and punishing violent crime generally, deterring and punishing violent crime and intimidation directed at fundamental rights, and most specifically, deterring and punishing violent crime and intimidation directed at religion present such objectives. Providing such protection is clearly the objective of the Statute. *See Ga.Const.*, Art. I, § I, ¶ II ("Protection to person and property is the paramount duty of government . . . .").

Plaintiffs also have no meaningful argument that the Statute is not substantially related to those objectives. It is self-evident that forbidding the possession of weapons at specific locations is substantially related to deterring violence and intimidation at those locations by deterring those who might want to commit such violence or intimidation from bring weapons to those locations. *See, e.g., O.C.G.A. § 16-1-2(1)* (among general purposes of Georgia Criminal Code are "to forbid and prevent conduct which unjustifiably and inexcusably causes or

threatens substantial harm to individual or public interests"); *Ambles v. State*, 259 Ga. 406, 407 (1989) ("the purpose of criminal law is to serve the public functions of deterrence, rehabilitation and retribution . . . ."). Imposing a sanction on the first step in committing an offense is a justified method of addressing and deterring undesirable consequences. *See Fluker v. State*, 282 Ga. 290, 292 (1981).

Plaintiffs contend that they are forbidden to bring their weapons to church. In so arguing, they ignore the protection built into the statutory scheme. Subsection (d)(2) allows permit holders to take their weapons into sensitive places so long as (1) the management or security personnel of that location permits the carrying of the weapon; and (2) the weapon-carrier follows the decisionmaker's instructions as to how the weapon is to be secured. O.C.G.A. § 16-11-127(d)(2). This exception gives each church the opportunity to decide for itself whether it will allow weapons in its buildings and how those weapons may be carried.

As applied to Plaintiff Wilkins in particular, the Statute presents almost no barrier to carrying a weapon in his church. Rev. Wilkins is not only the Tabernacle's minister, he is also its CEO. (Doc. 5, ¶¶ 7, 24). Presumably then, the person who will decide whether Rev. Wilkins may bring a weapon into the Tabernacle and, if so, how it must be carried, is Rev. Wilkins himself. Given his

professed interest in carrying a firearm to the Tabernacle, one can only reasonably expect that he will allow himself to do so.

Of course, the exception would not allow Plaintiffs to force their weapon-carrying on places of worship that object to firearms. Requiring objecting places of worship to permit firearms on their premises arguably would present free-exercise problems. Under the Statute, though, those congregations that are comfortable with weapons may permit their presence so long as they are carried in a manner that meets a reasonable definition of the word "secured."

In response to the exception, Plaintiffs argue only that the State does not require them to obtain such permission at shopping malls. (Doc. 12 at 23). But shopping is not a fundamental constitutional right, and thus, the legislature has legitimately decided not to provide it with the same level of protection. Moreover, even if, as Plaintiffs assert, the State has purportedly granted its citizens the privilege of shopping without requesting permission to carry a weapon, this does not mean that the State is constitutionally obligated to extend that privilege to every location. *See*, *e.g.*, *Amnesty Internat'l, USA, v. Battle*, 559 F.3d 1170, 1182 (11th Cir. 2009) (First Amendment permits reasonable time, *place*, and manner restrictions). And unless the permission requirement is itself an unconstitutional infringement, which Plaintiffs have not asserted in either the Complaint or the

Amended Complaint,[3] then the choice to impose it at "sensitive places" is not a constitutional violation.

At the hearing, the Court expressed concern that the Statute might prevent Plaintiff Wilkins from carrying a weapon for protection at work. As discussed above, the exception would allow employees at "sensitive places" to carry weapons so long as their employer permitted this action. This exception should provide Rev. Wilkins with the protection he seeks. Additionally, there is simply no case law, and Defendants could find nothing in the historical record, that recognizes a Second Amendment right to take a weapon to work analogous to the right to keep a weapon at home that was recognized in *Heller*. Indeed, *Heller*'s list of "presumptively valid" restrictions would have to be rejected because "sensitive places" such as government buildings (which would include courthouses) and schools are, for many, places of employment. It is not necessary for the Court to resolve this ultimate issue, however, because the exception provides sufficient relief from any burden otherwise applied by the Statute.[4]

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[3] Instead, Plaintiff's injunction brief erroneously refers to the Statute as a "total ban." (Doc. 6-2 at 14).

[4] Plaintiffs also present the Court with faulty history, claiming that "[t]he original 'public gathering' law in Georgia was passed in 1873 . . . ." (Doc. 13 at 5). The original statute—prohibiting the carrying of weapons at public gatherings, including "any place of public worship"—was enacted in 1870 and the difference is significant. *See Hill v. State*, 53 Ga. 472, 2 (1874) (referring to and quoting

C. The Statute does not violate the Free Exercise clause of the First Amendment

As discussed more fully in Defendants' previous briefs, "[t]o plead a valid free exercise claim, [a plaintiff] must allege that the government has impermissibly burdened one of his sincerely held religious beliefs." *Watts v. Fla. Internat'l Univ.*, 495 F.3d 1289, 1294 (11th Cir. 2007). A free exercise plaintiff must believe his religion requires him to take the burdened action. *Id.* at 1297. Plaintiffs concede that no religious belief compels them to take a weapon to a place of worship and insist only that they wish to take firearms to church for protection, a sincere—but secular—purpose. (Doc. 6-2 at 10).

Instead, at least so far, Plaintiffs have relied only on admittedly general language traceable to the Supreme Court's decision in *Kedroff v. St. Nicholas Cathedral*, 344, U.S. 94, 107 (1952), to the effect that "[l]egislation that regulates church administration, [or] the operation of the churches . . . prohibits the free exercise of religion." *Kedroff*, though, was premised on "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in

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"[t]he act of October, 1870"). In December 1869, military rule was reinstituted in Georgia. *See* http://www.georgiaencyclopedia.org/nge/Article.jsp?id=h-2533. The next month, in "Terry's Purge," the commanding general "removed the General Assembly's ex-Confederates, replaced them with the Republican runners-up, and then reinstated the expelled black legislators . . . ." *Id.* It was this legislature that would have passed the Statute's forbear in October 1870. Accordingly, the Statute is not, as Plaintiffs assert, "rooted in Jim Crow." (Doc. 13 at 5).

short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Id.* at 116. Review of the federal courts' application of this principle over the years shows that Plaintiffs are asking this Court to apply this tenet in a novel manner well outside the domain in which it previously has been used.

Many of the cases applying the *Kedroff* ruling concern the so-called "ministerial exception," which holds that the otherwise generally-applicable laws forbidding various forms of employment discrimination are "not applicable to the employment relationship between a church and its ministers." *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1301 (11th Cir. 2000); *see also McCants v. Alabama-West Florida Conf. of United Methodist Church, Inc.*, 2010 WL 1267160 (11th Cir. 2010); *EEOC v. Catholic Univ. of America*, 83 F.3d 455 (D.C. Cir. 1996); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972); *Sanchez v. Catholic Foreign Soc. of America*, 82 F.Supp.2d 1338 (M.D. Fla. 1999). Other cases, like *Kedroff* itself, deal with church property disputes that cannot be resolved without delving into matters of church doctrine. *See Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem. Prebysterian Church*, 393 U.S. 440 (1969); *Hankins v. New York Annual Conf. of United Methodist Church*, 516 F.Supp.2d 225 (E.D. N.Y. 2007).

In sum, *Kedroff* forbids government interference in the governance, discipline, or doctrine of religious organizations. Plaintiffs, however, make no such claim concerning the Statute. They allege no interference with any religious beliefs, doctrines, acts, or decision-making. Instead, they merely assert that the Statute has a secular impact on a body that happens to be religious. This is not a free exercise violation. *See Watts*, 495 F.3d at 1297.

Moreover, even assuming Plaintiffs could meaningfully relate the Statute to "church administration," any constitutional concerns are alleviated by subsection (d)(2)'s permission exception which allows religious bodies to determine their own policies related to the possession of weapons in places of worship.

D. Count 5 of the Amended Complaint does not present a cause of action

In Count 5, Plaintiffs assert that the Statute violates the Constitution and ask that the Court declare it unconstitutional and enjoin its enforcement, the same relief Plaintiffs seek in the other counts. (Doc. 5, ¶¶ 51-54). Plaintiffs do not specify which provisions of the Constitution allegedly are offended. Defendants presume that Plaintiffs base Count 5 on the constitutional provisions previously identified—the Free Exercise clause of the First Amendment and the right to keep and bear arms under the Second Amendment. Because they seek no new relief, however, Count 5 presents no new cause of action. *See Santhuff v. Seitz*, 2010 WL 2667441,

4 (11th Cir. 2010) (Plaintiffs "confuse arguments with causes of action. . . . These arguments are not separate claims for relief").

If, however, Defendants have misread Count 5 and Plaintiffs intend to seek relief on one or more additional provisions of the Constitution beyond those identified in Counts 1 through 4, then they fail to state a claim under Rule 8(a). Fed.R.Civ.P. 8(a). At most, they assert the "mere possibility" that the Statute is unconstitutional, and that is insufficient to state a claim. *Sinaltrainal v. The Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009); *see also Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1950 (2009).

E. The State of Georgia did not waive its Eleventh Amendment immunity by removing this matter to federal court

Plaintiffs incorrectly state the law when they argue that the State of Georgia waived all immunities by removing this matter to federal court, citing the Supreme Court's ruling in *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613 (2002).

Along with its other protections, the Eleventh Amendment provides States with immunity from suit *in federal court*. U.S. Const., amend. XI; *Lapides*, 535 U.S. at 616. A State can waive that immunity. *Lapides*, 535 U.S. at 618. In *Lapides*, the Supreme Court concluded that "removal is a form of voluntary invocation of a federal court's jurisdiction sufficient to waive the State's otherwise

valid objection to litigation of a matter . . . *in a federal forum*." *Id.* at 624 (emphasis added). The *Lapides* Court explicitly did not address "the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated *in state court*." *Id.*, at 617-18 (emphasis added).

The Eleventh Circuit has not fully addressed the implications of *Lapides* in a published decision. In *Massalon v. Board of Regents of the University System of Georgia*, however, the Court confronted an argument similar to the one Plaintiffs present here. No. 02-14657 (2003).[5] In that case, the Court concluded that the Board of Regent's removal of the action to federal court waived its right to object to litigating *in federal court*, but did not waive immunities it could have raised in state court. *Massalon*, No. 02-14657, man.op. at 34. This Court has more than once recognized the line *Massalon* drew. *See Coates v. Natale*, 2010 WL 749630, 10 (M.D. Ga. 2010) (Royal, J.); *Grier v. Ga. Dep't of Public Safety*, 2009 WL 152584, 3 (M.D. Ga. 2010 (Royal, J.). In other words, by removing the matter to federal court, the State of Georgia waived its immunity *to the forum*, but not its sovereign immunity.

[5] A copy of the unpublished decision is submitted herewith.

The State of Georgia here does not raise any immunity arguments it could not have presented had the matter remained in state court. The State does not object to litigating Plaintiffs' claims *in federal court*, and indeed, acknowledges that it waived this specific defense by removing this matter to federal court. Instead, pursuant to the Eleventh Amendment and sovereign immunity, the State of Georgia objects to being required to litigate Plaintiffs' federal claims *at all*, a defense it could (and would) have raised in state court. *See Alden v. Maine*, 527 U.S. 706, 745, 754 (1999) (Eleventh Amendment immunity applies even when the plaintiff sues the state defendant in state court); *Hines v. Ga. Ports Auth.*, 278 Ga. 631, 633 (2004). Because the State of Georgia could have raised this defense if the case had remained in state court, it did not waive this defense by removing the matter to federal court. *Massalon*, No. 02-14567, man.op. at 34; *see also Alden*, 527 U.S. at 754 ("the States retain immunity from private suit in their own courts, an immunity beyond the congressional power to abrogate by Article I legislation").

And, regardless of immunity, it cannot be disputed that the "State of Georgia" is not a person under § 1983. The definition of "person" is an issue of statutory construction and not a question of immunity, and thus, cannot be waived. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997). Indeed, this was specifically noted in *Lapides* when the Supreme Court remanded the case with

instructions to dismiss the remaining § 1983 claim. *Lapides*, 535 U.S. at 617. Accordingly, Plaintiffs still cannot pursue a claim against the State of Georgia.

F. Plaintiffs cannot bring a direct action

Plaintiffs purport to bring Counts 1 and 3 (Doc. 5, ¶¶ 39-41, 45-47) as direct actions, which is not permitted.

It is certainly accurate, as Plaintiffs have pointed out, that the Supreme Court has permitted direct constitutional actions against *federal* personnel in the absence of a federal statute conferring the right to bring such action. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). The Supreme Court has also held, however, that such a direct action is not permitted "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green*, 446 U.S. 14, 18 (1980) (emphasis in original). Accordingly, the Eleventh Circuit has ruled because § 1983 provides an equally effective remedial scheme for violations of constitutional rights at the state level, a *Bivens*-type direct action is not appropriate against state officials. *Williams v. Bennett*, 689 F.2d 1370, 1390 (11th Cir. 1982).

Plaintiffs' only meaningful argument in support of the direct action is that such is necessary for them to sue the State because of § 1983's requirement that the

defendant sued be a "person." (Doc. 12 at 15). *Bivens*, however, requires only that a plaintiff have an adequate remedy, not that he necessarily must have it against every possible defendant. Sovereign immunity bars *Bivens* actions against the United States. *McCollum v. Bolger*, 794 F.2d 602, 608 (11th Cir. 1986). Likewise, even if Plaintiffs could otherwise do an end run around § 1983's linguistic strictures, any claim against the State of Georgia would still be barred by sovereign immunity. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984).

If Plaintiffs prevail on their constitutional arguments, then declaratory and injunctive relief against the Governor in his official capacity can provide them with all the relief they seek. *See Cate v. Oldham*, 707 F.2d 1176, 1180-83 (11th Cir. 1983) (discussing the necessity of using the "legal fiction" of official capacity actions against state officials to obtain equitable relief against a State). Because Plaintiffs have this remedy, a direct action is not allowed.

CONCLUSION

For the foregoing reasons and for the reasons previously submitted, the State of Georgia and Governor Perdue respectfully submit that this Court should grant their motion to dismiss.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed **SUPPLEMENTAL BRIEF OF DEFENDANTS STATE OF GEORGIA AND GOVERNOR PERDUE IN SUPPORT OF THEIR MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorney of record:

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