
**THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
DOCKET NO. 08-15571-A**

GEORGIACARRY.ORG, INC., ET AL.

Plaintiffs-Appellants,

v.

CITY OF ATLANTA, ET AL.

Defendants-Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA**

THE HON. MARVIN H. SHOOB, SENIOR JUDGE

**BRIEF FOR AMICUS CURIAE THE BRADY CENTER TO PREVENT
GUN VIOLENCE AND GEORGIANS FOR GUN SAFETY
IN SUPPORT OF DEFENDANTS-APPELLEES**

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Certificate of Interested Persons and Corporate Disclosure Statement

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Interest of Amicus Curiae

The Brady Center to Prevent Gun Violence (“The Brady Center”) is a non-profit organization dedicated to reducing gun violence through education, research, and legal advocacy. The Brady Center has a substantial interest in ensuring that state and federal gun laws are properly interpreted to prevent gun violence. Through its Legal Action Project, the Brady Center has filed numerous briefs amicus curiae in cases involving the interpretation of state and federal firearms laws. The Brady Center has particular expertise in the dangers of carrying concealed weapons, having published several reports on this subject, including *Guns & Business Don't Mix* (1997), *Forced Entry* (2005), and *No Gun Left Behind* (2007).

Georgians for Gun Safety is a non-profit organization that advocates for gun violence prevention by monitoring the legislative process, with the goal of reducing injuries and deaths from firearms in Georgia. Incorporated in 2003, the organization grew out of a previous ten-year effort to educate elected officials, law enforcement, and communities about the impact of firearms policy on public safety. Georgians for Gun Safety works in coalition with parent organizations, schools, law enforcement agencies, civil and human rights groups, domestic violence prevention organizations, and child advocates to reduce gun violence.

Statement of Issues

1. Whether, to the extent 2008 Georgia Laws Act 802 (“H.B. 89”) allows the carrying of concealed guns in Georgia airports, it is preempted because it (a) intrudes on an area in which federal law occupies the field and/or (b) obstructs Congress’s goals of safe and efficient air travel.
2. Whether H.B. 89 should be interpreted in a way that invites conflict between state law and federal regulations.
3. Whether the district court correctly concluded that H.B. 89’s definition of “public transportation” does not extend to the non-sterile areas of Georgia airports.

Summary of Argument

The district court's decision should be affirmed because H.B. 89, if interpreted to allow the carrying of concealed firearms in Georgia airports, is preempted by federal law.

In this post-9/11 age, when federal airport security policy demands the seizure of mouthwash and nail clippers because of their potential danger, Georgia has enacted a law that purportedly allows loaded firearms into America's busiest international airport. Such an intrusion on the federal regime of airport security is not permitted for several reasons. First, federal law wholly occupies the field of airport security, meaning that states may not legislate in this area. Second, any law allowing concealed firearms to be carried in the non-sterile¹ portions of U.S. airports is preempted because it obstructs the paramount Congressional objectives of safe and efficient air travel.

The proliferation of guns in airports will result in more injuries, more crime, more delays, and more threats to U.S. national security because—among other harmful effects—more guns will end up in the secured areas of airports. With airports already a vulnerable and sensitive target in the wake of 9/11, laws like H.B.

¹ A “non-sterile” area is anywhere in an airport that a member of the public may go without their person and property being screened. By contrast, a sterile area is one “that provides passengers access to boarding aircraft and to which the access generally is controlled by TSA, or by an aircraft operator . . . through the screening of persons and property.” 49 C.F.R. § 1540.5.

89 will only magnify the potential for acts of terrorism. Moreover, allowing guns to be carried in airports will increase the number of inadvertent security breaches, and the result will be a rise in major disruptions and delays. Already about six passengers arrive at security checkpoints carrying guns every day. Airport screeners have proven to be notoriously ineffective at detecting guns during screening, and recent testing shows that they are getting worse. By passing a law that will amplify these dangerous effects, the Georgia legislature is obstructing a critical federal purpose.

Moreover, as a matter of statutory interpretation, the Court should decline to read dubious and far-reaching security policy into H.B. 89. Such a reading invites conflict with the federal regime regulating airport security and is unsupported by H.B. 89's plain language.

The district court's decision should be affirmed.

ARGUMENT

I. If H.B. 89 Extends to Airports, It is Preempted by Federal Law.

GeorgiaCarry.org and Timothy Beardon (collectively, “GeorgiaCarry”) maintain that H.B. 89 allows possession of concealed firearms in Georgia airports. GeorgiaCarry also contends that federal law allows such a state policy. These contentions are wrong because, to the extent H.B. 89 permits guns to be carried in Georgia airports, it is preempted by federal law.

Federal law may preempt state law expressly or impliedly. *Gade v. Nat’l Solid Wastes Mgmt.*, 505 U.S. 88, 98 (1992); *Florida State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1167 (11th Cir. 2008) (citations omitted). State laws are impliedly preempted when federal law fully occupies a legislative field, known as “field preemption,” or when state and federal laws conflict, known as “conflict preemption.” *Browning*, 522 F.3d at 1167; *see also Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000). Courts and commentators have noted that the boundaries between field and conflict preemption are sometimes blurred, *Browning*, 522 F.3d at 1167 (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 n.5 (1990)), and a state law may be impliedly preempted both because it intrudes upon a field of federal regulation and conflicts with a federal scheme by obstructing a Congressional purpose. This is precisely what has happened here.

H.B. 89 is preempted under both field and conflict preemption. Congress's intent to preempt the field of airport security is evident from, among other things, the pervasiveness of federal regulations concerning airport security, including regulations that extend into the non-sterile areas of airports. Assuming H.B. 89 can be interpreted in the way advocated by GeorgiaCarry, the Georgia legislature is attempting to thrust its guns-in-airports policy into the field of airport security—an area fully controlled by federal law. Thus, the law is subject to field preemption.

H.B. 89 is also preempted because it conflicts with federal law by obstructing the federal government's substantial interest in safe and efficient air travel. Allowing concealed, loaded guns in the non-sterile areas of airports will make air travel less safe and threaten national security, and increase the frequency of disruptions and delays. For these reasons, H.B. 89 is not just bad policy, it is bad law.

A. Federal Law Preempts the Field of Airport Safety and Security.

“Field preemption occurs when a congressional scheme is ‘so pervasive as to make the reasonable inference that Congress left no room for the states to supplement it.’” *Browning*, 522 F.3d at 1167 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Federal regulation of airport security and air travel is pervasive in just this way, as it must be, because air travel among different cities, states, and countries requires regulation at the federal level in a way that ground transportation like city subways or bus systems do not. Indeed, American

law broadly recognizes that airports are unique spaces. *See Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 682 (1992) (Rehnquist, C.J., split opinion) (“To blithely equate airports with other transportation centers . . . would be a mistake.”). As a result, the federal government extensively regulated the field of airport security even before the 9/11 attacks proved the necessity of strict control over what passengers can bring with them to airports and onto airplanes. Congress expressed its legislative will that the federal government be the exclusive regulator in these areas by passing decades of comprehensive legislation and by delegating broad authority to federal agencies with jurisdiction over airports and air travel.²

Following 9/11, federal control over air travel safety was further expanded when Congress passed two free-standing statutes, the Aviation and Transportation Security Act (“ATSA”), Pub. L. No. 101-71, 115 Stat. 597 (2001) (codified as amended in scattered sections of 49 U.S.C.) and the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (49 U.S.C. § 114). These statutes created the Transportation Security Administration (“TSA”), which took over and expanded the duties of the Federal Aviation Administration. The ATSA

² *See, e.g.*, Pub. L. No. 85-726, § 601(a)(6), 72 Stat. 731, 775 (1958) (Federal Aviation Act of 1958); Pub. L. No. 93-366, 88 Stat. 409 (1974) (Antihijacking Act of 1974); Pub. L. No. 93-366, 88 Stat. 415 (1974) (Air Transportation Security Act of 1974); Pub. L. No. 99-83, 99 Stat. 190 (1985) (International Security and Development Cooperation Act of 1985); Pub. L. No. 101-604, 104 Stat. 3066 (1990) (Aviation Security Improvement Act of 1990).

bluntly underscored the federal government's interest in aviation security by organizing the TSA under the Department of Homeland Security. In 2007, Congress passed a third statute, the Implementing Recommendations of the 9/11 Commission Act of 2007, 6 U.S.C. § 101 *et. seq.* The broad scope of Congress's delegation of power in the ATSA and other statutes, and the breadth of the regulations promulgated pursuant to those laws, demonstrate that Congress intends federal law to occupy the field of airport security.³

Although many federal statutory and administrative regulations focus on security in the sterile portions of airports, many also reach out into the non-sterile areas of airports. For example, one regulation makes it illegal for “an individual [to] . . . have a weapon, explosive, or incendiary, on or about the individual's person or accessible property [w]hen performance has begun of the inspection of the individual's person or accessible property *before entering a sterile area.*” 49 C.F.R.

³ In addition to the numerous laws and regulations cited by the City of Atlanta, (*see* Appellee Br. at 25-34 (citing 49 U.S.C. §§ 114(f); 49 U.S.C. § 44904 (regulating domestic air transportation security); § 44942 (requiring that within 180 days of enactment of the ATSA that security screening performance levels be set and prepared for implementation) § 40101 (air safety are highest priorities); 49 C.F.R § 1540 (civil aviation security—general rules), § 1542 (airport security))), *see also*, e.g., 49 U.S.C. § 44912 (research and development of technologies to prevent terrorist acts against civil aviation); § 44916 (requiring periodic assessments to detect security vulnerabilities), § 44942 (requiring that within 180 days of enactment of the ATSA that security screening performance levels be set and prepared for implementation), § 44943 (establishment of a performance management system), § 40117(d)(2)(A) (regulating funding for programs that “preserve or enhance capacity, safety, or security of the national air transportation system”); 49 C.F.R § 1540.105(a)(1) (prohibiting interference with airport safety measures).

§ 1540.111(a)(1) (emphasis added); *see also id.* § 1540.111(a)(2) (prohibiting the carrying of weapons while entering sterile areas). Other TSA regulations relating to airport security that specifically regulate non-sterile areas include: 49 C.F.R. § 1542.103(a)(ii) (requiring airports to comply with a TSA-approved security program that identifies, among other things, a description of “[e]ach activity or entity on, or adjacent to a secured area that affects security” (emphasis added)); 49 C.F.R. § 1542.113 (requiring that *all* airport tenants institute TSA-approved security programs); and 49 C.F.R. § 1542.305 (requiring airports to post security advisories in public areas when instructed by the TSA). The extent of federal law and regulation surrounding airport security simply leaves no room for state law in this field.⁴

B. H.B. 89 Obstructs the Federal Goal of Ensuring Safe and Efficient Air Travel.

H.B. 89 is also preempted because it conflicts with federal law by “stand[ing] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Pharm. Research & Mfrs. of Am. v. Meadows*,

⁴ *See* Ex. 1, Letter from Bennie G. Thompson, Chairman of the Committee on Homeland Security in the U.S. House of Representatives, to Assistant Secretary Kip Hawley of July 21, 2008 (writing, in response to this litigation, that “[i]t is my belief that Federal law prohibits individuals from carrying firearms in all areas of an airport and that TSA has the authority to enforce these restrictions. To do otherwise would hamper TSA’s ability to keep our airports secure”); *see also* Thomas Frank, *TSA Weighs Airport Gun Ban in Unsecured Areas*, U.S.A. Today, Nov. 20, 2008 available at http://www.usatoday.com/travel/flights/2008-08-07-tsa-gun-ban_N.htm (accessed December 5, 2008).

304 F.3d 1197, 1205 (11th Cir. 2002) (quoting *Gade*, 505 U.S. at 98).⁵ Congress and federal agencies have enacted federal law and regulations to ensure safe and efficient air travel. For example, the purpose of the ATSA is “to improve aviation security.” ATSA, Pub. L. No. 101-71 (caption); *see also, e.g., Huntleigh USA Corp. v. United States*, 525 F.3d 1370, 1381 (Fed. Cir. 2008) (explaining that the ATSA was intended to transfer airport security responsibilities to TSA); *Am. Fed’n of Gov’t Employees v. Hawley*, 543 F. Supp. 2d 44, 47 (D.D.C. 2008) (observing that Congress enacted the ATSA “for purposes of national security”); *Am. Fed’n of Gov’t Employees TSA Local 1 v. Hawley*, 481 F. Supp. 2d 72, 94 (D.D.C. 2006) (noting that the ATSA is “captioned ‘An act to improve airport security, and for other purposes’”); *Gebin v. Mineta*, 231 F. Supp. 2d 971, 972 (C.D. Cal. 2002) (“[T]he [ATSA] was signed into law on November 19, 2001, with the stated purpose to ‘improve aviation security.’”); *see generally* 49 U.S.C. § 44903 (regulating air transportation security). Allowing guns in airports, even in non-sterile areas, obstructs this Congressional purpose by making air travel less safe and less efficient.

⁵ State statutes are not entitled to a presumption against implied conflict preemption, including obstacle preemption. *See Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) (“When considering implied preemption, no presumption exists against preemption.”).

1. *Allowing Guns to be Carried in Airports Invites Gun Violence and Hinders Law Enforcement's Response to Attacks.*

Following 9/11, airport security is inexorably linked with national security concerns, and guns have been used in acts of planned violence and terrorism targeting the non-sterile areas of airports both before and since. On July 4, 2002, a gunman opened fire at the El Al airlines ticket counter at Los Angeles International Airport, killing two and injuring several more.⁶ “[T]he incident prompted an immediate shutdown of the Thomas Bradley International Terminal at the airport and the rerouting and curtailment of dozens of flights.”⁷ Other examples of terrorists using guns to attack non-sterile areas of airports include: the 2002 New Orleans airport attack;⁸ the 1985 Rome and Vienna airport attacks;⁹ the 1982 Ankara air-

⁶ Rick Lyman and Nick Madigan, *Los Angeles Airport Gunman Slays 2 and Is Killed by Guard*, N.Y. Times, July 5, 2002, available at <http://query.nytimes.com/gst/fullpage.html?res=9501E5DA1031F936A35754C0A9649C8B63&sec=&spon=&pagewanted=all> (accessed December 3, 2008).

⁷ *Id.*

⁸ On May 22, 2002, a man at Louis Armstrong International Airport in Louisiana opened fire in a non-sterile area of the airport with a shotgun, killing one woman and injuring another. See Stephanie Doster, *Airport Shooting Suspect's Apartment Searched; Gun Parts, Prayer Tapes, Duct-Taped Outlets Found*, Times-Picayune, May 24, 2002, at 1 (describing the 2002 New Orleans attack); *A Trail of Airport Violence*, N.Y. Times, Dec. 28, 1985, at 5; Associated Press, *Woman Dies after Shooting at Louis Armstrong International Airport*, May 28, 2002, available at <http://findarticles.com/p/articles/mim0CWU/is/ai86392701> (accessed December 3, 2008); see also Doug Simpson, *New Orleans Airport Shooting Wounds 2*, The Associated Press, May 23, 2002, available in part at <http://www.highbeam.com/doc/1P1-53176651.html> (accessed December 3, 2008) (noting that the incident caused delays).

⁹ Margaret Coker, *Security: Spy Agency Trains El Al Personnel; Israel Quick to Praise Readiness, Response*, Atlanta J.-Const., July 7, 2002, at 3A; Rick Lyman, (Continued...)

port attack;¹⁰ the 1973 Rome airport attack;¹¹ the 1973 Athens airport attack;¹² and the 1972 attack on Ben Gurion airport in Israel.¹³ These assaults left dozens dead and hundreds wounded. More broadly, they undermine public confidence in air travel, deterring people from flying.

Even when airports do not attract planned violence and terrorism, allowing guns in unsecured areas of airports will result in violence, injury, and death. The simple fact—proven in numerous studies—is that greater availability of guns results in more gun deaths.¹⁴ For example, when guns are allowed in the workplace, there is a 500% to 700% increase in the likelihood of a homicide occurring there.¹⁵

An Attack Where Security is Probably the World's Tightest, N.Y. Times, July 5, 2002, at 16.

¹⁰ *A Trail of Airport Violence*, N.Y. Times, Dec. 28, 1985, at 5.

¹¹ *Id.*

¹² *Id.*

¹³ Coker, *supra* note 9, at 3A.

¹⁴ See, e.g., Matthew Miller, David Hemenway, Deborah Azrael, *State-Level Homicide Victimization Rates in the US in Relation to Survey Measures of Household Firearm Ownership, 2001-2003*, *Social Science and Medicine* (2006) (“States with higher rates of firearm ownership had significantly higher homicide victimization rates.”); Lisa M. Hepburn, David Hemenway, *Firearm Availability and Homicide: A Review of the Literature*, 9 *Aggression and Violent Behavior* 417 (2004) (“[H]ouseholds with firearms are at higher risk for homicide, and there is no net beneficial effect of firearm ownership.”); Matthew Miller, et al., *Rates of Household Firearm Ownership and Homicide Across US Regions and States, 1988-1997*, 92 *Am. J. Public Health* 1988 (Dec. 2002) (“[I]n areas where household firearm ownership rates were higher, a disproportionately large number of people died from homicide.”); Mark Duggan, *More Guns, More Crime*, 109 *J. Pol’y Econ.* 1086 (2001).

¹⁵ Dana Loomis, Stephen W. Marshall, Myduc L. Ta, *Employer Policies Toward Guns and the Risk of Homicide in the Workplace*, 95 *Am. J. of Pub. Health* 830 (Continued...)

Airports' unique circumstances make allowing guns in any area particularly bad policy because "the weight of the evidence is now firmly behind those who have found that right-to-carry laws do not reduce, and may even increase, the overall level of crime."¹⁶ Access to guns dramatically increases the likelihood of unplanned violence, particularly in stressful environments such as airports.¹⁷ That H.B. 89 on its face only applies to people licensed to carry concealed weapons does not change these facts. There are hundreds of documented incidents in which those with concealed carry licenses have been involved in incidents ranging from remarkably reckless accidents to cold-blooded murder. Ex. 2, Brady Center, *Assorted Crimes and Misdeeds by CCW Licensees* (2008); Ex. 3, Brady Center, *Forced Entry* 15-18 (2005).

To attempt to prevent violence in airports—particularly planned violence—federal regulations require every airport to have armed, trained law enforcement

(2005) ("[W]orkplaces where guns were specifically permitted were 5 to 7 times more likely to be the site of worker homicide relative to those where all weapons were prohibited.").

¹⁶ John J. Donohue, *The Final Bullet in the Body of the More Guns, Less Crime Hypothesis*, 2 *Criminology & Pub. Pol'y* 397, 399 (July 2003).

¹⁷ Matthew Miller, et al., *Firearm Availability and Unintentional Firearm Deaths*, 33 *Accident Analysis and Prevention* 477 (Jul. 2000) ("A statistically significant and robust association exists between gun availability and unintentional firearm deaths."); Julia Clothier, *When Cabin Fever Turns to Air Rage*, CNN, available at <http://www.cnn.com/2006/TRAVEL/08/08/air.rage/index.html> (accessed December 7, 2008) (observing the dangerous combination of air rage, caused by stress and anxiety, and alcohol, and noting that "the most extreme form of air rage [is] physical assault").

personnel present at all times. 49 C.F.R. § 1542.217(a). Thus, airports, like courthouses and other secured government spaces, enjoy mandated and constant protection. While these professional law enforcement officers are trained to use their weapons in the highly-trafficked, often confusing environments of busy airports, armed civilians are not. The presence of armed civilians is likely to hinder law enforcement personnel in responding to an incident. Because law enforcement officers will have to distinguish between innocent armed civilians and attackers, they will either under-respond—be reluctant to shoot when they need to—or over-respond—increasing the chance of armed innocents being shot. Also, a well-intentioned armed bystander attempting to help thwart an attack poses a threat to law enforcement and other bystanders. Because non-sterile areas of airports are targets for attack and are heavily protected by trained professionals, they are categorically different from all forms of public transit. The presence of armed citizens will only increase the risks of harm in airports.

2. *The Presence of Firearms in the Non-Sterile Portions of Airports Will Interfere With Airports' Ability to Efficiently Conduct Flight Operations.*

In addition to the potential for terrorism and other forms of gun violence, allowing guns in airports can create massive disruptions of air travel with wide-ranging effects even when there is no violence at all. In July 2002, it was reported that in the five months “[s]ince TSA took over aviation security responsibilities on

February 17, 2002, discoveries of guns, knives, and other potential weapons on passengers who had passed security checkpoints have prompted evacuations at 124 airports and resulted in 631 flights being called back to terminals so that passengers could be searched again.”¹⁸

Such disruptions have occurred at least twice in recent memory at the Hartsfield-Jackson Airport. On April 19, 2006, airport officials shut down all security checkpoints following detection of a suspicious device during screening. By the time operations resumed, “there had been no departures for more than an hour at the nation’s busiest airport, and all arrivals were delayed at least 90 minutes.”¹⁹ Because of the timing, at least 120 flights were affected.²⁰ Similarly, on November 16, 2001, all flights at the Hartsfield-Jackson Airport were halted when a man ran through a security checkpoint, eluding police. Even though an airport official stated no gun was involved—“to the best of [his] knowledge”—the airport took the

¹⁸ *Aviation Security and Transition*, Hearing Before the Comm. on Commerce, Science, and Transportation, United States Senate, 107th Cong., S. Hrg. 107-1119 (2002) at 36 (statement of Gerald L. Dillingham, Director, Physical Infrastructure Issues).

¹⁹ Associated Press, *Suspicious Device Found at Atlanta Airport*, U.S.A. Today, Apr. 19, 2006, available at http://www.usatoday.com/travel/flights/2006-04-19-atlanta-security-alert_x.htm (accessed December 2, 2008).

²⁰ *Id.*

threat “very seriously” and evacuated thousands of people from the terminal.²¹

“The security breach all but shut down the nation’s busiest airport, its effects rippling across the United States as all flights into or out of Atlanta were delayed on the busy travel weekend before Thanksgiving.”²²

Robert W. Kennedy, Assistant General Manager of Maintenance, Operation and Security at the Hartsfield-Jackson Airport, testifying in the preliminary injunction hearing before the district court, confirmed that the presence of guns in the non-sterile portions of airports significantly magnifies the potential for widespread disruptions.²³ Responding to the court’s question about what would happen in the event of an accidental discharge of a firearm, Mr. Kennedy testified that there would be a “stampede. People are going to want to get out of there because . . . we cannot get away from a post-9/11 environment.”²⁴ Mr. Kennedy continued:

Secondly, we’re going to freeze the airport. We’re not going to allow people to get onto flights. We’re not going to allow people to get off flights because until we can sort out what type of an event it is, because it may be an isolated event or it may be a well-choreographed attempt

²¹ Associated Press, *Atlanta Airport Terror Scare*, Nov. 16, 2001, available at <http://www.wired.com/techbiz/media/news/2001/11/48476> (accessed December 2, 2008).

²² *Id.*

²³ See Ex. 4, PI Hr’g Tr. 23-51, Aug. 11, 2008.

²⁴ *Id.* at 37:2-19 (adding that others might become “disoriented” or “separated” from their traveling companions).

to harm our national security. So those are two of the things that would happen if a firearm went off.²⁵

Focusing just on the impact on airport operations, Mr. Kennedy explained that if a firearm went off in either the sterile or non-sterile portion of the airport all flights would have to be suspended.²⁶ If the threat was significant enough, the airport might have to be “dumped,” meaning that everyone, including screened passengers already in the sterile portion of the airport, would have to be moved outside and subsequently re-screened.²⁷ Mr. Kennedy added that a shift to allow guns in the non-sterile portions would also burden airport security, requiring that they reconsider security and training protocols.²⁸

Although such incidents would be disruptive to any airport’s operations, their effects are magnified at Hartsfield-Jackson Airport, which serves approximately 245,000 people each day, seven million people each month, and ninety million people each year.²⁹ Of those, thirty-five percent are inbound or outbound passengers, meaning that 84,000 travelers pass through the airport each day—nearly ten percent of air travelers in the United States.³⁰ Any kind of shutdown at the air-

²⁵ *Id.* at 37:20-38:1.

²⁶ *Id.* at 38:7-39:25.

²⁷ *Id.* at 40:1-15.

²⁸ *Id.* at 41:3-8.

²⁹ *Id.* at 30:4-11.

³⁰ *Id.* at 30:17-22, 34:4-13.

port has a “cascading effect through the national and international transportation system,” imposing significant costs on the airlines and passengers.³¹ A state-enacted policy allowing guns in the non-sterile areas of airports such as H.B. 89 plainly conflicts with the federal interest in avoiding such disruptions.

3. *The Presence of Guns in Airports Burdens the Federal Interest in Airport Security and Operations.*

Allowing people to carry guns in non-sterile areas of airports will stand in the way of the federal government’s efforts to ensure safe and efficient airports. In addition to the threats of terrorism and security shutdowns, laws like H.B. 89 will increase the strain on TSA screening. On an average day, TSA discovers about six passengers flying through American airports who arrive at airport security checkpoints carrying guns.³² This rate has been consistent over the past decade. From 1995-2000, the FAA intercepted an annual average of two thousand firearms at security checkpoints:

Not only have we found security problems at air traffic control facilities, but more significantly, we have found problems at the screening checkpoints at airports. . . . The

³¹ *Id.* at 34:16-17, 35:3-12.

³² *Aviation Security: Reviewing the Recommendations of the 9/11 Commission*, Hearing Before the Comm. on Commerce, Science, and Transportation, United States Senate, 110th Cong., S. Hrg. 110-117 (2007) at 54-55 (response to written questions by Assistant Secretary Edmund S. “Kip” Hawley, Transportation Security Administration, Department of Homeland Security, reporting that the monthly, weekly, and daily average number of firearm interceptions were 172, 40, and 6, respectively, for the 2006 fiscal year, according to the TSA’s Performance and Results Information System).

[checkpoint security] screeners detect thousands of dangerous objects each year. Over the past 5 years, they detected nearly 10,000 firearms being carried through checkpoints, according to FAA.³³

There is also abundant anecdotal evidence of passengers licensed to carry concealed weapons—including public officials—attempting to enter sterile areas carrying guns.³⁴

³³ *Oversight Hearing on Aviation Security*, Hearing Before the Subcomm. on Aviation of the Comm. on Commerce, Science, and Transportation, United States Senate, 106th Cong., S. Hrg. 106-1136 (2000) at 11 (prepared statement of Associate Director Gerald Dillingham, Transportation and Telecommunications Issues, Resources, Community, and Economical Development Division, U.S. General Accounting Office, reporting on checkpoint security); *see also The Transportation Security Administration's Progress in Enhancing Homeland Security*, Hearing Before the Subcomm. on Infrastructure and Border Security of the Select Comm. on Homeland Security, House of Representatives, 108th Cong., Serial No. 108-49 (2004) at 18 (prepared statement of Deputy Administrator Stephen J. McHale, Transportation Security Administration, Department of Homeland Security, stating that “each day, TSA intercepts more than 5,000 prohibited items at airports around the country. Each month more than 40 firearms are intercepted at airport checkpoints”); *id.* at 13 (“Just since the beginning of this fiscal year, TSA screeners have intercepted more than 300 guns at airports around the country.”).

³⁴ *See, e.g.,* Jason Riley, *Congressman Guilty in Gun Case*, Louisville Courier-Journal, Aug. 11, 2004, available at <http://orig.courier-journal.com/localnews/2004/08/11ky/B1-airport0811-5268.html> (accessed December 2, 2008) (reporting that U.S. Congressman John Hostettler (R-IN, 8th Dist.) was stopped by airport screeners at the Louisville International Airport because he was carrying a semiautomatic pistol as he was heading for a US Airways flight); Associated Press, *Dickinson says Carrying Gun in Luggage was “A Total Mistake,”* Portsmouth Herald, July 21, 2003, available at <http://archive.seacoastonline.com/2003news/07212003/news/40569.htm> (reporting that New Hampshire State Representative Howard Dickinson was detained and questioned for almost six hours after security screeners at the Manchester Airport found a loaded .38-caliber handgun in his carry-on bag); *Loaded Gun Brings Arrest at Airport*, Miami Herald, Apr. 9, 2003, at 1B (reporting that Gerald Leggett, an employee and reserve deputy at the Monroe County Sheriff's Department was arrested at the Key West International Airport for attempting to board an aircraft with a semi-automatic handgun); The Associated Press, *Man “Forgot” Loaded Gun in Briefcase*, Dec. 31, 2001, partially available at <http://www.highbeam.com/doc/1P1-49218428.html> (accessed December 3, (Continued...))

In addition to those who carelessly attempt to enter sterile areas carrying guns, some do so knowingly and intentionally. As a senior TSA official testified before the United States House of Representatives in 2004, the high volume of firearms intercepted at security checkpoints by screeners “tells us first, that we must continue to be diligent in our screening efforts, and second, that many passengers are not voluntarily complying with the ban on bringing prohibited items onto aircraft.”³⁵ The official noted that while most “cases are not intentional violations, too frequently individuals are deliberately attempting to circumvent security or test the security system. We have intercepted a knife concealed inside a soda can, a sword hidden inside a cane, and a knife hidden within a prosthetic leg, just to name a few examples.”³⁶

A law permitting concealed weapons to be carried in Georgia airports would likely increase the number of guns carried in non-sterile areas of the Hartsfield-

2008) (reporting that Barry Brunstein, a transportation safety consultant, was caught with a loaded .9-mm Beretta in his briefcase at Memphis International Airport during a random security stop and that *Brunstein had passed through security at Tampa International Airport on the first leg of his trip without the gun being detected*); Edwin McDowell, *Guns at Airports: A Common Problem*, N.Y. Times, Dec. 29, 1992, available at <http://query.nytimes.com/gst/fullpage.html?res=9E0CE4DA163BF93AA15751C1A964958260&sec=&spon=&pagewanted=all> (accessed December 2, 2008) (reporting that performer Harry Connick Jr. was arrested for bringing an unloaded gun to security).

³⁵ *The Transportation Security Administration's Progress in Enhancing Homeland Security*, *supra* note 33, at 18 (prepared statement of Deputy Administrator Stephen J. McHale, Transportation Security Administration, Department of Homeland Security).

³⁶ *Id.*

Jackson and other airports in the State. As several guns reach security checkpoints daily already, increasing the number of guns in airports is almost certain to increase the number of guns reaching security checkpoints. TSA screeners cannot afford to assume that a passenger attempting to pass through security with a gun is doing so unintentionally. Therefore, every additional gun reaching a checkpoint further strains the TSA's resources. Not only does this impact other passengers' ability to pass through security checkpoints quickly, but it also strains TSA screeners' ability to effectively screen other passengers. Thus, a law permitting the carrying of concealed weapons in airports would have the invidious effect of making sterile areas in airports less secure, obstructing the goal of the entire federal regulatory scheme.

Even under the status quo, security checkpoints intended to prevent the transport of prohibited items into secure areas are not always effective. In 2000, a senior U.S. General Accounting Office official reported to the United States Senate that the FAA "found a number of cases in which passengers passed through checkpoints on the first flight of their trips *and were subsequently found to have loaded guns at screening checkpoints prior to boarding connecting flights.*"³⁷ The official offered this frightening snapshot of historical efficacy levels of airport screeners:

³⁷ *Oversight Hearing on Aviation Security*, *supra* note 33, at 11 (prepared statement of Associate Director Gerald Dillingham, Transportation and Telecommunications (Continued...))

Concerns have been raised for many years by us and by others about the effectiveness of the screeners and the need to improve their performance. In 1978, the screeners were not detecting 13 percent of the potentially dangerous objects FAA agents carried through checkpoints during tests—a level that was considered “significant and alarming.” In 1987, we found that screeners were not detecting 20 percent of the objects during FAA’s tests. . . . To rectify some of these problems, the Federal Aviation Reauthorization Act of 1996 mandated that FAA certify screening companies, improve the training and testing of the screeners, and develop performance standards. However, Mr. Chairman, problems with the screeners’ performance remain a serious concern. Data on FAA’s test results cannot be released publicly, but our research shows that the screeners’ ability to detect objects during the agency’s tests is not improving, and in some cases is worsening.³⁸

Subsequent testing has revealed that screener performance is indeed worsening following the shift to TSA regulation. Testifying again in 2002, the same official reported that “recent TSA testing found that screeners at 32 of the nation’s largest airports failed to detect fake weapons (guns, dynamite, or bombs) in almost a *quarter* of the undercover tests at screening checkpoints.”³⁹ Such trends continue

cations Issues, Resources, Community, and Economical Development Division, U.S. General Accounting Office, reporting on checkpoint security) (emphasis added); *see also id.* (“[S]creeners do not identify all threats, and instances occur each year in which weapons are discovered to have passed through a checkpoint.”).

³⁸ *Id.* at 11-12.

³⁹ *Aviation Security and Transition*, *supra* note 18, at 36 (statement of Gerald L. Dillingham, Director, Physical Infrastructure Issues) (emphasis added); *Weak Links: How Should the Federal Government Manage Airline Passenger and Baggage Screening*, Joint Hearing Before the Comm. on Governmental Affairs and the Oversight of Government Management, Restructuring, and the District of Colum- (Continued...)

today,⁴⁰ and a recent report adds: “As we reported in 2000, since 1978, the FAA and the airline industry have continued to face challenges in improving the effectiveness of airport checkpoint screeners, and we reported that screeners were not detecting dangerous objects, *including loaded firearms*.”⁴¹ The report attributed “screening detection problems primarily to high turnover rates among screeners, among other things.”⁴²

Unquestionably, allowing guns in any part of the airport makes it more likely that guns will slip through security undetected. Even now, guns pass

bia Subcomm., United States Senate, 107th Cong, S. Hrg. 107-208 (2001) at 12 (testimony of Kenneth M. Mead, Inspector General of the Department of Transportation) (reporting that the FAA needs “standards for measuring the screener performance. Now, what is acceptable? Is detecting a test object 6 out of 10 times, 8 out of 10, 9 out of 10 acceptable? And this is important because if screeners are having difficulty detecting objects that are pretty obvious like a test gun . . .”).

⁴⁰ *Moving Beyond the First Five Years: How the Transportation Security Administration (TSA) Will Continue to Enhance Security for All Modes of Transportation*, Hearing Before the Subcomm. on Transportation Security and Infrastructure Protection of the Comm. of Homeland Security, House of Representatives, 110th Cong., H. Hrg. 110-105 (2008) at 30 (statement of Clark Kent Ervin, Director, Homeland Security Initiative, Aspen Institute) (“First of all, undercover government and media investigations continue to the present day to show what they have shown since 9/11: screeners far too often fail to spot concealed guns, knives and bombs.”).

⁴¹ United States Government Accountability Office, Report to Congressional Requestors, House of Representatives, *Homeland Security: Progress Has Been Made to Address the Vulnerabilities Exposed by 9/11, but Continued Federal Action Is Needed to Further Mitigate Security Risks*, at 31 (2007) (emphasis added).

⁴² *Id.*; see also *Oversight Hearing on Aviation Security*, *supra* note 33, at 12 (explaining problems in screener hiring and retention); *Aviation Security (Focusing on Training and Retention of Screeners)*, Hearing Before the Subcomm. on Aviation of the Comm. on Transportation and Infrastructure, House of Representatives, 106th Cong., H. Hrg. 106-77 (2000) (same).

through American security checkpoints—and not just in tests.⁴³ Accordingly, allowing firearms into non-sterile areas of the airport strips away a layer of protection from sterile areas because a higher number of firearms reaching the security checkpoints means that a higher number will slip through to the sterile areas. This result obstructs the federal purpose of ensuring safe and efficient air travel, and it is not permitted.

Laws permitting guns in airports will also have other, less obvious obstructive effects. For example, in the absence of a ban on carrying guns in airports, law enforcement may have difficulty distinguishing between someone who is legally permitted to be carrying a gun from someone who intends to smuggle his gun into a sterile or secure area. This would deprive law enforcement of reasonable suspicion to detain someone seen with a concealed weapon in a non-sterile area of the airport for questioning. *See United States v. Ubiles*, 224 F.3d 213, 217-18 (3d Cir. 2000) (suppressing an unlicensed firearm on the grounds that the officer lacked

⁴³ *See, e.g.*, Martin Weil & Del Quentin Wilber, *Traveler with Gun Apparently Clears Security Checkpoint*, Washington Post, Jan. 23, 2008, at B03; *Aviation Security and Transition*, *supra* note 18, at 3 (statement of Senator McCain) (“Just this week, it was reported that an Orlando-bound Delta Express flight from Long Island had to be diverted to a Virginia airport after a passenger found a loaded handgun in the plane’s bathroom.”); *United States v. Fortenberry*, 860 F.2d 628 (5th Cir. 1988) (involving defendant who was found to have carried a revolver on his flight); *see also* Jane O. Hansen & Maurice Tamman, *UGA Fan’s Hunt for Camera Bag Turns World’s Busiest Airport into Haltsfield*, Atlanta J.-Const., Nov. 17, 2001, at A1 (reporting that the Atlanta airport was shut down for hours when a passenger reentered a sterile area to retrieve a bag he had forgotten).

reasonable suspicion to initiate a *Terry* stop because, before the stop, he had no reason to believe that the firearm was unlicensed or otherwise possessed illegally). Requiring law enforcement to wait until someone attempts to enter a sterile area with a gun increases the likelihood that they will succeed.

II. H.B. 89 Should Be Given the Construction Atlanta Urges.

Even if it is not preempted, the Court should avoid construing H.B. 89 to allow guns to be carried in the non-sterile areas of Georgia airports, assuming such a construction is even supported by its language. If construed as urged by Georgia-Carry, H.B. 89 will create impermissible conflict with federal regulation. *See, e.g.*, 49 C.F.R. § 1540.111(a)(1). For this reason, the Court should eschew that interpretation, particularly in the absence of clear language and the presence of a provision in H.B. 89 specifically stating that it is impermissible to “carry a firearm into a place prohibited by federal law.” H.B. 89. Had the Georgia legislature intended H.B. 89 to be read as urged by Georgia-Carry, it would have made this intention explicit.⁴⁴

⁴⁴ In a case like this, the concepts underlying obstacle preemption also apply to the statutory interpretation question because both analyses require examination of Congressional purpose. *See* Fallon, Jr. et al., Hart and Wechsler’s *The Federal Courts and the Federal System* 728 (5th ed. 2003) (asking whether “all preemption questions [can] be reduced to a single question of statutory interpretation,” and noting the analytical similarities between obstacle preemption analysis and statutory interpretation).

Because H.B. 89 does not support GeorgiaCarry's interpretation on its face, it should be interpreted to be consonant with federal law. In areas where state and federal schemes overlap, the Court must attempt to "reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill Lynch Pierce Fenner Smith Inc. v. Ware*, 414 U.S. 117, 127 (1973); cf. *Jones v. United States*, 529 U.S. 848, 857 (2000) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." (quotation marks and citations omitted)). Accordingly, the Court should decline an interpretation of H.B. 89 which invites conflict with the federal regulatory scheme.

Furthermore, had the Georgia legislature truly intended to override a long-standing and prudent security measure at the world's busiest airport, it would have done so explicitly. GeorgiaCarry's statutory interpretation argument to the contrary places tremendous weight on a single citation. (See Appellant Br. at 12-13.) Too much weight, in fact, because the Court must interpret H.B. 89 with the assumption that the Georgia legislature, like Congress, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Association*, 531 U.S. 457, 468 (2001) (citations omitted). Indeed, this Court has

noted that “this rule of statutory interpretation is *particularly apt where the statutory provision at issue is ambiguous, where prior law reflected significant policy considerations of great longevity and importance, and where a proposed interpretation is in clear conflict with state or federal laws of great importance.*” *In re Colortex Industries, Inc.*, 19 F.3d 1371, 1375 (11th Cir. 1994) (emphasis added) (citing *United States v. Ron Pair Enterps.*, 489 U.S. 235, 245 (1989)). The Court should not presume that the Georgia legislature intended to accomplish such a radical and dangerous shift through an ambiguous reference.

III. By its Own Terms, H.B. 89 Does Not Permit Concealed, Loaded Firearms to be Carried in the Non-Sterile Portions of Georgia Airports.

The Brady Center and Georgians for Gun Safety concur in the argument by the City of Atlanta that Judge Shoob correctly determined that H.B. 89’s definition of “public transportation” does not extend to the non-sterile areas of Georgia airports. (*See Appellee Br. at 9-24.*)

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the district court and hold that H.B. 89 is preempted.

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Certificate of Compliance

I certify that this brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. This brief contains 6,916 words.

This the 23rd day of December, 2008.

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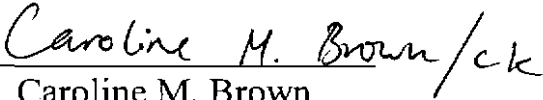
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