CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1, 26.1-2, 26.1-3, and 28-1(b), the undersigned counsel of record for Defendants-Appellees, City of Atlanta, *et al.*, certifies that the following persons and entities may have an interest in the outcome of this case:

Alston & Bird LLP

Ashe, Rafuse & Hill LLP

Atlanta, City of, Defendant-Appellee

Bearden, Timothy, Plaintiff-Appellant

DeCosta, Benjamin, Defendant-Appellee

Fenby, Erica L., Counsel for Defendants-Appellees

Franklin, Shirley, Defendant-Appellee

Georgia, State of

GeorgiaCarry.Org, Inc., Plaintiff-Appellant

Jewkes, Joshua D., Counsel for Defendants-Appellees

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Riley, Christopher A., Counsel for Defendants-Appellees

Sam-Buchanan, Yonette, Counsel for Defendants-Appellees

Schoob, The Hon. Marvin

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees the City of Atlanta, Mayor Shirley Franklin and Ben DeCosta (collectively, "Defendants") do not request oral argument.

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STATEMENT OF JURISDICTION

This is an appeal of a final decision by the United States District Court for the Northern District of Georgia (the "District Court"), and this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. The District Court had subject matter jurisdiction based on federal question jurisdiction under 28 U.S.C. § 1331.

STATEMENT OF THE ISSUES

1. Whether the District Court, applying traditional rules of statutory construction, correctly concluded that the plain text of the 2008 Georgia Laws Act 802 ("H.B. 89") does not apply to airports, and therefore does not create a right to carry concealed, loaded firearms in the non-sterile areas of Hartsfield-Jackson Atlanta International Airport.

2. Whether Congress preempted the field of airport security regulation when, in the wake of September 11th, it enacted the Aviation Transportation Security Act ("ATSA") and thereby created a pervasive and comprehensive regulatory security program designed to secure the nation's airports and bolster confidence in the safety of the country's aviation system.

STATEMENT OF THE CASE

A. Nature of the Case

Plaintiffs GeorgiaCarry.org, Inc. ("GeorgiaCarry") and Timothy Bearden ("Bearden"), relying on Georgia state law – H.B. 89 – filed a lawsuit seeking a declaration that they have the unrestricted right to carry concealed, dangerous firearms in the non-sterile areas of Hartsfield-Jackson Atlanta International Airport ("Airport").[1] The District Court dismissed the lawsuit with prejudice, holding that H.B. 89 does not apply to airports based on its plain language and does not authorize licensed gun holders to violate airport security regulations. Although the District Court did not reach the constitutional issues raised by the Appellees, H.B. 89 cannot be construed to grant Appellants the right to violate Airport security measures because that field has been completely preempted by post-September 11th federal statutes and regulations.

B. Proceedings and Disposition Below

Plaintiffs sued the City of Atlanta, Atlanta Mayor Shirley Franklin, the Airport, and the City's Aviation General Manager, Benjamin DeCosta, in the United Stated District Court for the Northern District of Georgia, seeking declaratory and injunctive relief. (Compl., R1-1.) The Complaint alleged that the Airport's restrictions on carrying firearms in non-sterile areas of the Airport

[1] Because Bearden is also a member of GeorgiaCarry, we refer to Plaintiffs collectively as either "GeorgiaCarry" or "Plaintiffs."

violated O.C.G.A. § 16-11-173 and the U.S. Constitution.[2] *Id.* Plaintiffs' claims were predicated on the false legal assumption that H.B. 89 allows individuals to carry concealed, loaded firearms in the Airport. *Id.*

Plaintiffs filed an emergency motion to preliminarily enjoin the Airport from enforcing its firearm restrictions in the non-sterile areas of the Airport. (R1-7.) Following an evidentiary hearing, the District Court denied the motion, holding that Plaintiffs had "failed to establish a substantial likelihood of success on the merits of their claim that the law permits them to carry guns in the airport . . . [and] also failed to carry their burden with respect to the other requirements for a preliminary injunction." (Order, R1-39-74-75.)

Defendants filed a motion for judgment on the pleadings, contending that H.B. 89 does not apply to the Airport, but if it did, federal law preempts state efforts to regulate airport security measures. (R1-24.) The District Court granted Defendants' motion, holding that the "plain terms of the law do not support plaintiffs' interpretation, and all of plaintiffs' arguments in favor of reading H.B. 89 as applying to airports are without merit." (Order, R2-50-3.) The District Court therefore dismissed Plaintiffs' constitutional claims because "[a]ll of these claims depend upon plaintiffs' contention that H.B. 89, by authorizing GFL holders to

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[2] Plaintiffs alleged violations of the Militia Clause, Fourth Amendment, Due Process, and Equal Protection. (Compl., R1-1.) Plaintiffs do not challenge on appeal the District Court's holding that each of the constitutional claims are predicated on finding that H.B. 89 applies to airports. (Order, R2-50-3.)

carry firearms in the Airport, effectively repealed state law prohibiting such conduct." (Order, R2-50-3, n.1.) Plaintiffs filed a timely notice of appeal. (R3-52.)

C. Statement of the Facts Alleged in the Complaint

It is uncontested that for more than 30 years it has been unlawful to carry concealed, loaded guns in the Airport. Initially, Georgia law made it a misdemeanor to carry a firearm "while at a public gathering." O.C.G.A. § 16-11-127(a) (the "Public Gathering Law"). In 1976, the definition of public gathering was amended to include "publicly owned or operated buildings." 1976 Ga. Laws 1432, *codified* at O.C.G.A. § 16-11-127(b). Since that time, the Airport has prohibited the carrying of concealed, loaded weapons at the Airport. (Order, R2-50-4.)

In 2008, the Georgia General Assembly passed H.B. 89 which, among other things, authorizes licensed gun holders to carry concealed weapons in "public transportation." (Order, R2-50-5.) On June 30, 2008, one day before the statute took effect, Mr. DeCosta learned that Georgia House Representative Timothy Bearden intended to violate the Airport's firearm restrictions by bringing a concealed, loaded weapon into the Airport. (R2-25-10.) In response, Mr. DeCosta and Mayor Shirley Franklin issued a media advisory notifying the public of their

intention to continue to enforce the Airport's security policy and cause to be arrested anyone who violated the law. (R1-18-13.)

H.B. 89 became effective on July 1, 2008. Order, R2-50-5. That same day, Plaintiffs filed suit alleging that H.B. 89 creates an affirmative right to carry concealed, loaded weapons in the Airport, and therefore superseded the Airport's longstanding prohibition on dangerous guns in the Airport. (Compl., R1-1.) Plaintiffs' Complaint did not acknowledge the comprehensive federal safety and security regime enacted by Congress and overseen by federal regulators since September 11, 2001.

D. Standard of Review

This Court reviews district court orders granting judgment on the pleadings *de novo*. *Horsley v. Rivera*, 292 F.3d 695, 700 (11th Cir. 2002). A party is entitled to judgment on the pleadings where no material fact is in dispute, and judgment may be rendered by considering the pleadings and any judicially noticed facts. *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998); *see* Fed. R. Civ. P. 12(c). On review, this Court should affirm a district court's decision if it is correct for any reason. *Acevedo v. First Union Nat'l Bank*, 357 F.3d 1244, 1248 (11th Cir. 2004); *United States v. $121,000.00 in United States Currency*, 999 F.2d 1503, 1507 (11th Cir. 1993).

SUMMARY OF THE ARGUMENT

Plaintiffs claim that they have an unrestricted right to carry concealed, loaded guns at the world's busiest airport. This claim falsely assumes that state law – H.B. 89 – creates an affirmative right to carry firearms in the Airport. Georgia law does not create that right. Congress, moreover, has preempted the field of airport safety and security with a pervasive and comprehensive regulatory program designed to protect visitors and passengers at our nation's airports. Specifically, Plaintiffs' claims fail for two reasons:

First, as a matter of state law, Plaintiffs do not have the right to carry concealed, loaded guns in the Airport. H.B. 89, by its terms, does not apply to airports. Moreover, two other Georgia statutes – the Public Gathering Law (O.C.G.A. § 16-11-127) and Georgia's Transportation Passenger Security Act of 2002 ("TPSA") (O.C.G.A. § 16-12-121-128) – prohibit people from carrying concealed, loaded guns in the Airport.

Second, Congress has the power to regulate safety and security measures at our nation's airports and to preempt state regulation of this field.[3] Congress exercised this power by enacting the Aviation and Transportation Security Act ("ATSA"), which delegates to the Transportation Security Administration ("TSA") sweeping regulatory authority over safety and security at domestic airports.

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[3] The District Court's conclusion regarding the plain text of H.B. 89 made it unnecessary for the Court to reach the preemption issue. (Order, R2-50-3.)

Because Congress has occupied the field of airport safety and security regulation, Georgia cannot interfere with Congress's regulatory scheme by creating an unfettered right that would allow people to carry lethal weapons in the Airport. Federal law also preempts H.B. 89 from applying to airports because the state law would create a major obstacle to Congress's goal of maintaining safe and secure airports. Congress's sweeping airport security regulations occupy the field and leave no room for state interference.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The District Court Correctly Granted Defendants' Motion For Judgment On The Pleadings And Held That H.B. 89 Does Not Apply To Airports

A party is entitled to judgment on the pleadings where no material facts are in dispute, and judgment may be rendered by considering the substance of the pleadings and any judicially noticed facts. *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998); Fed. R. Civ. P. 12(c). The District Court correctly determined that there are no material facts in dispute in this case.[4] (Order, R2-50-3) ("[A]ll of plaintiffs' claims turn upon their contention that H.B. 89 applies to airports. This is an issue of statutory construction as to which there are no material facts in dispute.").

A. H.B. 89 Does Not Apply to Airports

The District Court correctly held that the "plain terms of the law do not support plaintiffs' interpretation, and all of plaintiffs' arguments in favor of

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[4] Plaintiffs' unsupported argument that the District Court's discussion of purported Georgia legislative history converts the motion for judgment on the pleadings into a motion for summary judgment is wrong. (Apps' Br. at 7.) The law governing the conversion of a motion for judgment on the pleadings is the same as for a motion to dismiss, *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002), and citations to such public records do not convert the motion into one for summary judgment. *Papasan v. Allain*, 478 U.S. 265, 269 n.1, 106 S.Ct. 2932, 2935 (1986) ("Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in our review of the complaint from taking notice of items in the public record....").

reading H.B. 89 as applying to airports are without merit." (Order, R2-50-3.) H.B. 89 makes no mention of airports but, instead, provides as follows:

> A person licensed or permitted to carry a firearm by this part shall be permitted to carry such firearm, subject to the limitations of this part, in all parks, historic sites, and recreational areas, including all publicly owned buildings located in such parks, historic sites, and recreational areas and in wildlife management areas, notwithstanding Code Section 12-3-10 and in wildlife management areas notwithstanding Code Section 27-3-1.1 and 27-3-6, and in ***public transportation*** notwithstanding Code Sections 16-12-122 through 16-12-127; provided, however, that a person shall not carry a firearm into a place prohibited by federal law.

O.C.G.A. § 16-11-127(e) (emphasis added). As a reading of the plain text shows, H.B. 89 does not mention the word "airport." *Id.*; (Order, R2-50-6.) Therefore, H.B. 89 could ***only*** apply to the Airport if the undefined term "public transportation" includes airports.

1. The Ordinary Meaning of "Public Transportation" Does Not Include Airports

To determine if the term "public transportation" in H.B. 89 includes airports, the District Court correctly applied relevant rules of statutory construction. Georgia law mandates that "in all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter." O.C.G.A. § 1-3-1(b). As required by Georgia law and Eleventh Circuit precedent, the District Court first examined "the plain meaning of the statute." *Moore v. Am. Fed'n of Television & Radio Artists*,

216 F.3d 1236, 1244 (11th Cir. 2000) (citation omitted); *Bohannon v. Manhattan Life Ins. Co.*, 555 F.2d 1205, 1208 (11th Cir. 1977) ("Georgia has provided that in the construction of all statutory enactments the 'ordinary signification shall be applied to all words.'") (citation omitted).

The District Court's conclusion that "public transportation" does not include airports is correct for several reasons. First, the ordinary meaning of "public transportation" in the context of H.B. 89 does not include an airport. (Order, R2-50-6.) Air travel is not ***"public"*** transportation. The airlines are not owned or operated by any governmental entity, as is the case with MARTA or other public transportation systems. *Id.* Second, an airport is not public ***"transportation"*** in the context of H.B. 89 because, as Plaintiffs concede, federal law prohibits airline passengers from carrying guns onto an airplane. (Order, R2-50-6-7.) Thus, except for persons who have unloaded firearms in their checked baggage (as permitted by federal law), the ***only*** individuals who could arguably carry a gun into the Airport are ***non-traveling*** individuals. Adopting Plaintiffs' argument regarding the scope of H.B. 89 would produce the illogical result that H.B. 89 – a provision purportedly applying to "transportation" – was meant to cover ***only non-traveling*** individuals. (Order, R2-50-7.) Therefore, giving the terms "airport" and "public

transportation" their ordinary meaning, the District Court correctly concluded that H.B. 89 does not apply to airports.[5]

This conclusion is reinforced by the language used by the Georgia Assembly in the TPSA, which Plaintiffs acknowledge prohibits individuals from carrying guns into an airport. Specifically, the TPSA makes it a felony to "introduc[e] [a firearm] into a ***terminal***," and defines "terminal" as an "aircraft, bus or rail vehicle station, depot, any such transportation facility, or infrastructure relating thereto operated by a transportation company or governmental entity or authority." O.C.G.A. §16-12-122(10) (emphasis added). H.B. 89, on the other hand, permits guns "in ***public transportation***" and does not use the term "terminal." (Order, R2-50-5-7.) Therefore, the plain text of both statutes shows that the Georgia legislature intended the scope of H.B. 89 (*i.e.*, "public transportation") to differ

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[5] On appeal, Plaintiffs argue for the first time that the Airport's use of a "Park and Ride" bus to move people from a parking lot to the Airport terminal constitutes "public transportation" within the meaning of H.B. 89. (Apps' Br. at 14.) This argument was not raised in the District Court and is therefore waived for purposes of the appeal. *Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) ("Because Plaintiff failed to make this argument in the district court, we decline to consider it here."); *F.D.I.C. v. Verex Assurance, Inc.*, 3 F.3d 391, 395 (11th Cir. 1993)("[A]ppellate courts generally will not consider an issue or theory that was not raised in the district court."). Moreover, Plaintiffs never argued that H.B. 89 allowed licensed firearms holders to carry concealed, loaded firearms on buses moving people to the Airport premises. Therefore, regardless of whether a private or public entity operates the Park and Ride shuttle, it is irrelevant for purposes of whether H.B. 89 allows loaded, concealed guns in non-sterile areas of the Airport.

from the scope of the TPSA (*i.e.*, "terminals" defined to include airports). Otherwise, the two pieces of legislation would have used similar terms.

2. Plaintiffs' Citations to Georgia Cases Purportedly Defining "Public Transportation" to Include Airports Are Irrelevant

Plaintiffs incorrectly cite *Clayton County Airport Authority v. State*, 453 S.E.2d 8 (Ga. 1995), for the proposition that H.B. 89's reference to "public transportation" includes airports. *Clayton* did not interpret or define the words "public transportation." *Id.* at 25. Rather, in holding that the county had the power to contract with the county airport authority for the expansion of a local airport, the court simply noted that the county is "authorized specifically to expend tax revenues to provide for the use of the airport facility" and "authorized generally to undertake to provide for '[p]ublic transportation.'" *Id.* (citing O.C.G.A. § 48-5-220(14) and Ga. Const. Art. IX, Sec. II, Para. III (A)(9)). This narrow and irrelevant holding cannot be read to define "public transportation" in H.B. 89 to include airports. Indeed, the *Clayton* court based its holding on a separate Georgia statute that specifically allowed the county to expend tax revenues for the use of an "airport facility." *Id.* (citing O.C.G.A. § 48-5-220(14)).

Plaintiffs' citation to *City of Atlanta v. Yusen Air & Sea Service Holdings, Inc.*, 587 S.E.2d 230 (Ga. Ct. App. 2003), is even less relevant. The court in *Yusen* addressed the City of Atlanta's attempt to acquire land for a runway in a condemnation proceeding under a Georgia statute authorizing condemnation of

"property or interests for public road and other transportation purposes." O.C.G.A. § 32-3-2. *Yusen* did not involve the term "public transportation" and therefore is inapplicable here.

3. The District Court's Interpretation Of H.B. 89 Does Not Make the Final Sentence Of The Law Surplusage

Plaintiffs mistakenly contend that the District Court's interpretation of H.B. 89 makes the statute's final sentence – "a person shall not carry a firearm into a place prohibited by federal law" – surplusage. (Apps' Br. at 17.) As a savings clause, this provision cannot be read to alter the otherwise plain meaning of the statute, which does not apply to airports. This provision is but a truism, as the Georgia Assembly is simply prohibiting conduct via state law that is already prohibited by federal law. *See* U.S. Constitution, Art. VI, Cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). The District Court, moreover, correctly held that this savings provision applied to the ***entire*** scope of H.B. 89 (*i.e.*, parks, historic sites, recreational and wildlife management areas, and public transportation), ***not*** just to "public transportation." (Order, R2-50-8.) Because federal law prohibits carrying firearms in national parks and recreation areas (36 C.F.R. § 2.4), such as the Chattahoochee River National Recreation Area, the provision is not surplusage. It applies to at least federally owned parks and

recreation areas in Georgia, and is thus not surplusage regardless of whether H.B. 89 applies to airports. (Order, R2-50-8-9.)

B. H.B. 89 Did Not Repeal Georgia's Existing Laws That Prohibit Guns At Airports

Additionally, H.B. 89 does not apply to airports because two other Georgia statutes – the Public Gathering Law (O.C.G.A. § 16-11-127) and Georgia's Transportation Passenger Security Act of 2002 ("TPSA") (O.C.G.A. § 16-12-122 *et seq.*) – prohibit individuals from carrying concealed, loaded guns in airports, and nothing in H.B. 89 repeals these statutory provisions.

1. The TPSA Prohibits Guns at Airports and H.B. 89 Did Not Repeal the TPSA

As previously discussed, the TPSA makes it a felony to "introduc[e] [a firearm] into a terminal," and defines "terminal" to include an airport. O.C.G.A. §§ 16-12-127, 16-12-122(10). In support of their argument that H.B. 89 decriminalized the possession of firearms in airports, Plaintiffs contend that H.B. 89 implicitly repealed the TPSA. (Apps' Br. at 13.) According to Plaintiffs, with the TPSA implicitly repealed, no laws – state or federal – prohibit guns in airports. *Id.* Ignoring the fact that repeals by implication are highly disfavored, *Watt v. Alaska*, 451 U.S. 259, 266-67, 101 S.Ct. 1673, 1678 (1981), Plaintiffs strain to argue that the TPSA ***must*** have been repealed because if it were not, then H.B. 89's "notwithstanding the TPSA" language – authorizing firearms in public

transportation "notwithstanding Code Sections 16-12-122 through 16-12-127" – would be superfluous. (Apps' Br. at 13.)

H.B. 89, however, did not repeal the TPSA. First, as stated above, H.B. 89 does not apply to airports based on its plain language, and therefore cannot repeal the TPSA, a statute that undisputedly applies to airports. Second, H.B. 89's failure to encompass airports does not render the "notwithstanding" language superfluous. H.B. 89 allows a licensed individual to carry a firearm in public transportation. (Order, R2-50-5.) The TPSA explicitly prohibits carrying a firearm on a bus or train. O.C.G.A. § 16-12-123(b). Because public transportation encompasses a bus or train, the Georgia General Assembly needed to include the language "notwithstanding Code Sections 16-12-122 through 16-12-127" to clarify that licensed individuals could carry firearms in public transportation "notwithstanding" the TPSA. Therefore, the District Court's holding that H.B. 89 does not cover airports does not render the final sentence of the statute surplusage.

2. The Public Gathering Law Prohibits Guns at Airports and Neither H.B. 89 Nor the TPSA Repealed the Public Gathering Law

Plaintiffs concede that, since at least 1976, guns have been prohibited in the Airport pursuant to O.C.G.A. § 16-11-127(a), which prohibits firearms at a public gathering. The statute defines public gathering to include "publicly owned or

operated buildings." O.C.G.A. § 16-11-127(b). It is undisputed that the Airport is a publicly owned or operated building, and, therefore a public gathering.

H.B. 89 did not amend or repeal this part of O.C.G.A. § 16-11-127, the Public Gathering Law. If the Georgia legislature intended to repeal or amend the public gathering prohibition as applied to airports, it would have said or done so in H.B. 89.[6] It did not. Therefore, H.B. 89's failure to repeal the Public Gathering Law as it applies to airports leaves that law's prohibition on guns in the Airport in full force. O.C.G.A. § 16-11-127(a).[7]

The TPSA similarly did not amend or repeal the Public Gathering Law because the two statutes address ***different*** crimes that criminalize ***different*** conduct. A violation of the TPSA requires specific intent. A violation of the Public Gathering Law does not. Specifically, an individual is guilty of a felony under the TPSA if he or she carries a gun "with the ***intention*** of avoiding or interfering with a security measure or of introducing [it] into a terminal...."

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[6] The language of H.B. 89 further demonstrates that the Georgia legislature did not intend to amend or alter the Public Gathering Law because the provision on firearms referenced a different code section. H.B. 89 (provision applies "notwithstanding Code Sections 16-**12**-122 through 16-**12**-127."). H.B. 89 says nothing regarding the public gathering provisions of O.C.G.A. § 16-**11**-127.

[7] The fact that passengers may check unloaded guns in checked baggage pursuant to federal – not state – law, has no effect on whether H.B. 89 or the TPSA repealed the Public Gathering Law. 49 C.F.R. § 1540.111(c).

O.C.G.A. § 16-12-127(a) (emphasis added).[8] By contrast, an individual is guilty of a misdemeanor under the Public Gathering Law if he or she simply carries a gun at a public gathering, which includes a publicly owned building, ***regardless of intent.*** O.C.G.A. § 16-11-127(a). Therefore, there is no inconsistency between the TPSA and the Public Gathering Law, and both statutes remain in effect as applied to airports. (R2-37-17); *see Mullis v. State*, 27 S.E.2d 91, 97-98 (Ga. 1943) ("An assault with intent to murder ... is a felony... and a bare assault or simple assault and battery is only a misdemeanor.") (citation omitted); *Jones v. State*, 622 S.E.2d 425, 427 (Ga. Ct. App. 2005) (holding that misdemeanor crime and felony crime can apply to the same conduct, where felony requires an additional element).

Plaintiffs' argument regarding repeal of the statutes runs afoul of cardinal rules of statutory construction with respect to repeals by implication. It is well settled that repeals of statutes by implication are disfavored. *Watt*, 451 U.S. at 266-67, 101 S.Ct. at 1678 (1981) ("[R]epeals by implication are not favored....We must read the statutes to give effect to each if we can do so while preserving their sense and purpose.") (citations and quotations omitted); *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 262, 112

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[8] The TPSA contains an "affirmative defense to a violation ***of this Code section***" if the individual notifies a law enforcement officer of the presence of the gun as soon as possible after learning of its presence and surrenders the gun to the officer. O.C.G.A. § 16-12-127(c). Therefore, this provision is not an affirmative defense to an arrest under the Public Gathering Law, O.C.G.A. § 16-11-127(a) – only to a violation of the TPSA.

S.Ct. 683, 690 (1992) ("[I]t is a 'cardinal rule ... that repeals by implication are not favored....'") (citations and quotations omitted); *Thornton v. McElroy*, 20 S.E.2d 254, 256 (Ga. 1942) ("Repeals by implication are never favored."). The Eleventh Circuit requires more than mere psycho-analytic conjectures and speculations as to what the General Assembly ***really*** meant before it will interpret one state law as implicitly repealing another. *Gjellum v. City of Birmingham*, 829 F.2d 1056, 1063 (11th Cir. 1987) ("Since repeals by implication are disfavored . . . much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to 1983 suits."). Plaintiffs offer scant, if any, support for the claim that H.B. 89 repealed two specific statutes that criminalized two different types of conduct.

C. The Court Did Not Consider Evidence Outside The Pleadings

Plaintiffs argue that the District Court erred in considering evidence outside the pleadings in the form of purported legislative history, thereby converting the motion into one for summary judgment. (Apps' Br. at 6.) This argument is meritless.

First, Plaintiffs fail to cite any authority for the argument that courts consider evidence "outside the pleadings" when they consult legislative history. (Order, R2-50-6-7.) On the contrary, it is well established that courts may take judicial notice of legislative history without converting a motion into one for summary

judgment. *Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 226-27, 79 S.Ct. 274 (1959) (taking "judicial notice" of legislative history on a motion to dismiss); *Wang v. Pataki*, 396 F. Supp. 2d 446, 453 n.1 (S.D.N.Y. 2005) ("In ruling on a 12(b)(6) motion to dismiss, the Court may consider the documents submitted in the state administrative proceedings. The Court may also take judicial notice of public documents, such as legislative histories.") (citations omitted).[9]

Second, the District Court did not ***rely*** on the purported legislative history in granting Defendants' motion. Rather, the Court only interpreted H.B. 89's plain language and determined that the statute's plain language did not apply to airports. (Order, R2-50-6, 13.) Indeed, because the statute's plain language was unambiguous, the District Court expressly held that there was ***no*** need to look outside the language of the statute. (Order, R2-50-7) ("Plaintiffs have not pointed to any ambiguity in the statutory language which would require the Court to look beyond the four corners of the statute.").[10]

This was the correct conclusion because courts cannot use legislative history to contradict the plain meaning of a statute. *Garcia v. Vanguard Car Rental USA,*

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[9] The law governing the conversion of a motion for judgment on the pleadings is the same as for a motion to dismiss. *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002).

[10] On appeal, Plaintiffs, ignoring any standard of reasonableness, now argue that "the very existence of this lawsuit . . . must lead a reviewing court to conclude that the statute is ambiguous." (Apps' Br. at 19.) Of course ambiguity is not demonstrated simply because a party is willing to pay a filing fee and file a lawsuit and Plaintiffs cite no authority for this illogical argument.

Inc., 540 F.3d 1242, 1247 (11th Cir. 2008) ("[L]egislative history cannot be used to contradict unambiguous statutory text or to read an ambiguity into a statute which is otherwise clear on its face.") (internal citation omitted); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568-70, 125 S.Ct. 2611 (2005) (discussing potential problems of relying on legislative history); *Harry v. Marchant*, 291 F.3d 767, 772 (11th Cir. 2002) (en banc) (holding courts should follow clear statutory language even where an inquiry into legislative history might reveal contrary congressional intent); *United States v. Maung*, 267 F.3d 1113, 1121 (11th Cir. 2001) (holding legislative history is irrelevant unless the plain meaning produces absurd results).

The District Court discussed two items of purported legislative history only to hold that the items did not create any ambiguity in H.B. 89. (Order, R2-50-10-13.)[11] Such a discussion of the purported legislative history is appropriate and does not convert the motion into one for summary judgment. *Christy v. Sheriff of Palm Beach County*, 288 Fed. App'x 658, 665 (11th Cir. 2008) (holding that a motion to dismiss is not converted into one for summary judgment where the court refers to outside evidence but does not rely on it) (citing *Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) (holding that a motion to dismiss is not converted

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[11] The District Court specifically held that Rep. Bearden's affidavit was not entitled to "any weight." (Order, R2-50-12) ("It is a well-settled rule of statutory construction that 'affidavits by drafters after enactment of legislation will not be considered by the court.'").

where the court refers to extraneous material for background purposes but does not rely on it as a basis for dismissal); *Casazza v. Kiser*, 313 F.3d 414, 418 (8th Cir. 2002) (holding that the district court did not convert a motion to dismiss where it did not rely on any matters outside the pleadings in granting the motion); *Jackson v. S. Cal. Gas Co.*, 881 F.2d 638, 642 n.4 (9th Cir. 1989) (same).

Third, Plaintiffs' argument – that courts consider evidence "outside the pleadings" whenever they consult legislative history – would turn every motion for judgment on the pleadings or motion to dismiss involving statutory interpretation into a motion for summary judgment. The District Court cited well-established principles of statutory construction stating that where a statute is unambiguous, courts need not look beyond the statute barring "clear evidence of contrary legislative intent." (Order, R2-50-6.) Every judicial finding that a statute's plain meaning should be adopted necessarily requires an implicit determination that there is no "clear evidence of contrary legislative intent." Therefore, Plaintiffs' contention would artificially turn all legal questions of statutory interpretation into evidentiary issues not susceptible to resolution on a motion to dismiss or motion for judgment on the pleadings. As shown above, this is not the law. 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1367 (3d ed. 2004) (a motion for judgment on the pleadings is appropriate where "the sole question is the applicability or interpretation of a statutory provision").

D. The Court Should Construe H.B. 89 as Not Encompassing Airports Pursuant to the Doctrine of Constitutional Avoidance

The Court should apply the doctrine of constitutional avoidance to affirm the District Court's holding that H.B. 89 does not apply to airports. "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 348, 56 S.Ct. 466, 483 (1936). As this Court has stated, "[w]here a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States v. Love*, 449 F.3d 1154, 1158 (11th Cir. 2006) (quoting *Jones v. United States*, 529 U.S. 848, 857, 120 S.Ct. 1904, (2000)); *see also United States v. Levy*, 391 F.3d 1327, 1354-55 (11th Cir. 2004) (citation omitted) ("Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

As discussed at length below, an interpretation of H.B. 89 that would apply it to airports would raise the constitutional question as to whether the state law is preempted by federal law. (R1-39-74.) As the District Court held, H.B. 89 is unquestionably susceptible to the interpretation that the phrase "public

transportation" does not encompass airports. (Order, R2-50-3.) Therefore, the Court should adopt this interpretation of H.B. 89 to avoid the constitutional preemption question.

II. The District Court's Judgment Should be Affirmed Because Federal Law Preempts H.B. 89

The District Court did not address the issue of federal preemption because it held that H.B. 89 does not apply to airports. (Order, R2-50-3) ("[T]his conclusion makes it unnecessary for the Court to address defendants' preemption argument."). This Court, however, should affirm the granting of Defendants' motion for judgment on the pleading because, to the extent that H.B. 89 grants a right to carry concealed, loaded guns in airports, it is preempted by federal law.[12] *Collins v.*

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[12] Although the District Court did not decide the preemption question, it raised serious questions as to whether H.B. 89 was preempted by federal law in denying Plaintiffs' motion for preliminary injunction:

> "[E]ven if the law did apply to airports, defendants have raised a serious question as to whether the law would be preempted by federal law. Following 9/11, Congress created the Transportation Security Administration and gave it sweeping regulatory authority over safety and security at domestic airports. Under our Constitution, federal law is supreme. If Congress has occupied the field of airport safety and security, then Georgia cannot interfere with Congress's regulatory scheme by creating a right that would allow people to carry guns in the airports. While the preemption question is not yet ripe for a final decision, the Court finds that plaintiffs have not demonstrated that they are substantially likely to succeed on this issue."

(R2-39-74-75.)

Seaboard Coastline R.R. Co. 681 F.2d 1333, 1335 (11th Cir. 1982) ("If for any reason the [district court's] decision was correct, it is due to be affirmed.").

A. The Federal Government Occupies the Field of Airport Safety and Security

Courts infer Congress's intent to "occupy the field" when there is (1) "'a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it'," ***or*** (2) "where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *English v. Gen. Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 2275(1990); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372, 120 S.Ct. 2288, 2293-94 (2000). As described below, Congress has plainly intended to occupy the field of airport safety and security in both respects.

1. The Federal Regulation of Airport Safety and Security is Pervasive and Comprehensive

Following the terrorist attacks of September 11, 2001, Congress responded swiftly and decisively with a series of comprehensive security measures designed to secure the nation's airports and to bolster confidence in the safety and security of our domestic aviation system. Congress passed the Aviation and Transportation

Security Act ("ATSA") and thereby created the TSA within the Department of Homeland Security. 49 U.S.C. § 114.[13]

Congress passed the ATSA to federalize airport safety and security. *Am. Fed'n of Gov't Employees TSA Local 1 v. Hawley*, 481 F. Supp. 2d 72, 76 (D. D.C. 2006) ("The central feature of the Act is ***federalization of the nation's transportation security system*** through creation of the Transportation Security Administration ('TSA')."") (emphasis added); *Springs v. Stone*, 362 F. Supp. 2d 686, 690 (E.D. Va. 2005) (noting that the ATSA is "a legislative initiative designed to strengthen national security through the ***federalization of the civil transportation system***...The most essential aspect of civil transportation security addressed by the ATSA, and for which the TSA is accountable, is ***improving airport security*** to prevent a reprise of the tragic events of September 11, 2001.") (emphasis added); *Am. Fed'n of Gov't Employees TSA Local 1 v. Hawley*, 543 F. Supp. 2d 44, 47-48 (D. D.C. 2008) ("Congress enacted [the ATSA] to improve security in the nation's transportation system. In order to achieve this goal, Congress created the TSA within the Department of Transportation and charged it with assuring 'security in all modes of transportation.'") (citation omitted).

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[13] The TSA is headed by the Under Secretary of Transportation for Security (the "Under Secretary"). 49 U.S.C.A. § 114(b)(1). Congress granted the Under Secretary broad, discretionary authority, empowering the Under Secretary "to issue, rescind, and revise such regulations as are necessary to carry out the functions of the Administration." 49 U.S.C. § 114(l).

The ATSA specifically delegated to the TSA the field of airport safety and security, stating that the "Under Secretary ***shall*** be responsible for . . . ***aviation security***." 49 U.S.C. § 114(d)(1) (emphasis added). Congress delegated to the Under Secretary broad authority with a broad mandate, directing that it ***shall***:

- "oversee the implementation, and ensure the adequacy, of ***security measures at airports*** and other transportation facilities;"
- "develop policies, strategies, and plans for dealing with threats to transportation security;"
- "enforce security-related regulations and requirements;"

49 U.S.C. §§ 114(f)(3), (7), (11)(emphasis added).[14]

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[14] There can be no mistake about Congress's intent to occupy the field of airport safety and security regulation, as it also directed the Under Secretary to undertake these additional responsibilities:

> "(1) receive, assess, and distribute intelligence information related to transportation security; (2) assess threats to transportation; ... (4) make other plans related to transportation security, including coordinating countermeasures with appropriate departments, agencies, and instrumentalities of the United States Government; . . . (8) identify and undertake research and development activities necessary to enhance transportation security; (9) inspect, maintain, and test security facilities, equipment and systems; . . . (13) work in conjunction with the Administrator of the Federal Aviation Administration with respect to any actions or activities that may affect aviation safety or air carrier operations; . . . (15) carry out such other duties, and exercise such other powers, relating to transportation security as the Under Secretary considers appropriate, to the extent authorized by law."

49 U.S.C. § 114(f).

The ATSA also requires the Under Secretary to "decide on and carry out the most effective method for continuous analysis and monitoring of security threats to th[e] [domestic air transportation] system." 49 U.S.C. § 44904(a). To that end, the Under Secretary shall "take necessary actions to improve domestic air transportation security" by correcting any deficiencies in the security. 49 U.S.C. § 44904(e). These delegated powers are open ended and manifest an unmistakable intent by Congress to empower the TSA with the regulatory authority to protect people at our nation's airports.

Indeed, Congress directed the Under Secretary to deploy law enforcement personnel at airports as necessary to counter the risk of criminal violence and the risk to operations at the airport. 49 U.S.C. § 44903(c) ("When deciding whether additional personnel are needed, the Under Secretary shall consider the number of passengers boarded ***at the airport***, the extent of anticipated risk of criminal violence or aircraft piracy ***at the airport*** or to the air carrier aircraft operations ***at the airport***, and the availability of qualified State or local law enforcement personnel ***at the airport***.") (emphasis added).[15] This regulatory authority extends to the "airport perimeter," and Congress mandated that the Under Secretary require

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[15] As another clear reflection of Congress's intent to occupy the field of airport safety and security, it delegated to the TSA regulatory authority over local issues such as airport design, architecture, and construction, requiring that the designs "allow for maximum security enhancement." 49 U.S.C. § 44914.

airports to initiate security measures "***before*** entry into a secured area of an airport." 49 U.S.C. § 44903(h)(4).

The TSA has exercised this broad authority over airport security to implement security measures throughout an airport and beyond the security checkpoint, as reflected in the following comments:

> We have significantly increased the layers of security throughout the airport environment. ***Within airports themselves, TSA is focusing beyond the physical checkpoint – to push our borders out, so to speak – to look more at people and to identify those with hostile intent or those conducting surveillance even if they are not carrying a prohibited item.*** By spreading our layers of security throughout the airport environment and elsewhere, we have multiple opportunities to detect terrorists and leverage the capabilities of our workforce, our partners, and our technology.

One Year Later: Have TSA Airport Security Checkpoints Improved?, Hearing Before the H. Comm. on Oversight and Gov't Reform, 110th Cong. 3 (2007) (statement of Kip Hawley, Assistant Sec'y, Transp. Sec. Admin., Dep't of Homeland Sec.) (emphasis added); *see also TSA Implementation of the 9/11 Comm'n Recommendations: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 110th Cong. 3 (2007) ("We have to be strong at the checkpoint, but also many other places - including the back, front, and sides of the airport.");[16] *id.* at 4

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[16] *See One Year Later*; *supra* at 2 ("The discussion of aviation security almost always starts at the familiar TSA security checkpoint. For the two million travelers a day who fly, that is TSA to them. However, TSA looks at the checkpoint as but a piece – an important piece – of a much larger picture. Because of that larger picture, ***TSA looks at the entire aviation system in evaluating risk***....") (emphasis

("The SPOT program has already added great value to our overall security system. For example, a Behavior Detection Officer recently identified an individual at a ***ticket counter*** carrying a loaded gun and more than 30 rounds of ammunition.") (emphasis added).

The legislative history of the ATSA provides further evidence of Congress's intent to create pervasive, broad, and comprehensive ***federal*** regulatory oversight over airport security:

> The bill before us today will create a ***comprehensive Federal system.*** There will be ***Federal*** screeners. There will be ***Federal*** supervisors who are armed law enforcement personnel. There will be a ***Federal*** person in charge of every airport in our country to look at the safety system, to make sure it works.

147 CONG. REC. 22797 (2001) (statement of Sen. Hutchison) (emphasis added).

> I am very pleased House and Senate negotiators have reached agreement on an airline security package to ***fully federalize security at every airport in the United States.***

Id. at 22800 (statement of Sen. Warner) (emphasis added).

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added); *id.* at 3 (noting that aviation security begins "before a passenger even shows up at a TSA checkpoint."). The TSA has also implemented Behavior Detection Officers who perform security screening throughout the airport, including non-sterile areas such as baggage claim and ticket counters. *Fiscal 2009 Budget: TSA: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 110th Cong. 2 (2008) (oral statement of Kip Hawley, Assistant Sec'y, Transp. Sec. Admin., Dep't of Homeland Sec.)("We have added new layers of security in front of the checkpoint and to other areas of the airport including ... Trained Behavior Detection Officers who can identify someone who could pose a threat ***well before*** that person gets to the checkpoint, let alone the aircraft.") (emphasis added).

> We are securing the top of the airplane. We are securing the bottom of the airplane. We are securing the cockpit of the airplane. ***We are securing the airports through which people go.***

Id. at 22798 (statement of Sen. Hutchinson) (emphasis added).

The TSA regulations promulgated pursuant to the ATSA have further implemented Congress's intent and directive to create a pervasive regulatory scheme of airport safety and security. Indeed, the federal government enacted an entire section of the TSA regulations (49 C.F.R. Part 1542) – titled "Airport Security" – to carry out this congressional intent. These regulations require every airport to establish an Airport Security Coordinator to ensure that all airport security operations are compliant with the federal regulations, and provide the TSA with blanket inspection and oversight authority over an airport's compliance with the federal regulations. 49 C.F.R. §§ 1542.3, 1542.5.

These regulations necessarily delegate certain security responsibilities to the local airport operator because each airport must develop a comprehensive "security program" that prevents the "introduction of an unauthorized weapon, explosive, or incendiary onto an aircraft." 49 C.F.R. §§ 1542.101(a)(1).[17] The security program must cover numerous aspects of airport security and be ***approved, inspected and monitored by the TSA***. 49 C.F.R. §§ 1542.5, 1542.101(a)(5), 1542.103.

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[17] The ATSA mandated that the Under Secretary require each airport "to establish an air transportation security program that provides a law enforcement presence and capability at each of those airports that is adequate to ensure the safety of passengers." 49 U.S.C. § 44903(c).

In 2007, Congress further expanded the broad federal authority over the security of airports in the Implementing Recommendations of the 9/11 Commission Act of 2007 ("9/11 Commission Act"), 6 U.S.C. § 101, where, for example, Congress authorized the TSA to develop Visible Intermodal Prevention and Response ("VIPR") teams to perform additional security activities throughout airports, among other locations. 6 U.S.C. § 1112.

2. There is a Dominant Federal Interest in the Field of Airport Safety and Security that Preempts State Regulation

Under the Supremacy Clause, field preemption also occurs when Congress regulates an area "'in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 93 S.Ct. 1854, 1859 (1973) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 67 S.Ct. 1146, 1152 (1947)). Thus, courts have held that state laws are preempted where the federal interest is especially strong. *Boyle v. United Techs. Corp.*, 487 U.S. 500, 508 n.4, 108 S.Ct. 2510, 2516 (1988).

The ATSA and TSA regulations embody Congress's paramount national security objectives with respect to airport safety and security. *Springs*, 362 F. Supp. 2d at 705 (noting that the ATSA was enacted "to address [] national security and passenger safety... Security was Congress's paramount concern."). The text

of the ATSA expressly states the dominance of the federal interest in airport security. 49 U.S.C. § 40101(a)(1) ("assigning and maintaining safety [are] the highest priorities in air commerce."); 49 U.S.C. § 40101(d)(1) (stating that "assigning, maintaining, and enhancing safety and security [are] the highest priorities in air commerce."). Congress could not have expressed its dominant interest and intent in any clearer language, providing that "the clear intent, encouragement, and dedication of Congress to further the highest degree of safety in air transportation and air commerce, and to maintain the safety vigilance that has evolved in air transportation and air commerce and has come to be expected by the traveling and shipping public." 49 U.S.C. § 40101(a)(3).

The Senate Conference Report underscores Congress's dominant interest in airport safety and security. 147 CONG. REC. 22802 (2001) (statement of Sen. Rockefeller) ("As we learned after the attacks on September 11, we can no longer ignore the security needs at our Nation's airports.... Airport security is no longer just a transportation issue, it is a national security concern, and the Federal Government will now take on this critical responsibility."); *id.* at 22797 (statement of Sen. Hutchison) ("The bill we are passing today will close the loopholes in aviation security so the people of our country, when they get on an airplane, will know every conceivable means of securing that aircraft are being utilized."); *see also* H.R. CONF. REP. NO. 107-296, at 54 (2001), as reprinted in 2002

U.S.C.C.A.N. 589, 590. ("The Conferees expect that security functions at United States airports should become a Federal government responsibility....").[18]

3. To the Extent That H.B. 89 Purports to Allow Guns in the Airport, It Is Preempted by Federal Law

Both principles of field preemption – (i) a pervasive scheme of federal regulation and (ii) a dominant federal interest in the field – are present in this case. Therefore, to the extent that H.B. 89 could be interpreted to allow guns in the Airport, it is preempted by federal law.[19]

B. Any Attempt by the State of Georgia to Allow Loaded Guns in the Airport Would Also Obstruct the Accomplishment of Congress's Objective to Create Safe and Secure Airports

States, including Georgia, also do not have the power to regulate guns at airports because such regulation would conflict with the federal scheme of regulations and would thereby be preempted. Conflict preemption occurs where "state law 'stands as an ***obstacle*** to the accomplishment and execution of the full purposes and objectives of Congress.'" *English*, 496 U.S. at 79 (emphasis added); *see also Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1157

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[18] The Supreme Court often relies on legislative history when deciding preemption issues. *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 261, 124 S.Ct. 1756 (2004); *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 98, 103 S.Ct. 2890 (1983).

[19] Guns are prohibited in the Airport pursuant to the City's gun-free policy at the Airport. The City has authority to enact the policy pursuant to 49 U.S.C. § 44903(c) and 49 C.F.R. Part 1542, both of which require airports to establish and implement a security program to ensure the safety of passengers.

(11th Cir. 2008). Whether a state law constitutes such an obstacle requires an examination of the relevant federal statutes and regulations and identification of their purpose and intended effects. *Crosby*, 530 U.S. at 373.

As discussed above, Congress has unambiguously intended to federalize the nation's air transportation system for the paramount purpose of creating safe and secure airports. *See* 49 U.S.C. § 114; 49 U.S.C. § 44901; 49 C.F.R Parts 1540 and 1542; 6 U.S.C. § 101. Another stated purpose of the ATSA, the 9/11 Commission Act, and related regulations is to restore public confidence in airport security.[20]

To the extent that H.B. 89 were interpreted to allow individuals to carry lethal weapons in the crowded Airport, it would constitute an unquestionable "obstacle" to the accomplishment of the federal objectives of maintaining safe and secure airports and instilling public confidence in airport security. Plaintiffs' interpretation of H.B. 89 would allow the introduction of loaded guns into an

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[20] In the Conference Report, several Senators emphasized that a critical purpose of the ATSA was to ensure that the American public once again felt confident in airport security measures. 147 CONG. REC. 22797 (2001) (statement of Sen. Cleland) ("Ever since the tragic events of September 11, the American public has been crying out for tougher security to ensure that the horrifying events of 2 months ago will never again be repeated. This bill is our response to that call. [I]t . . . enhances America's national security and restores confidence to the flying public.") (emphasis added); *id.* at 22804 (statement of Sen. Snowe) ("Our goal was to restore the confidence of the American people in the aviation security system. I believe the measure before us will accomplish that goal."); *id.* at 22802 (statement of Sen. Rockefeller) ("The traveling public want and deserve ***safe and secure airports*** and airplanes, and this legislation gives them the confidence they need to keep flying.") (emphasis added).

otherwise safe and secure environment. Allowing individuals to carry these deadly weapons within a few feet of the security checkpoint, which Plaintiffs contend they would be allowed to do, reduces the time frame for law enforcement to react to prevent security breaches at the most critical area of the Airport. Requiring law enforcement personnel to somehow monitor individuals carrying concealed, loaded guns in the Airport would similarly distract such personnel from existing security measures that are vitally necessary for a safe and secure environment.

It is pure fantasy to suggest that allowing people to roam the crowded Airport with loaded guns would promote public confidence in Airport security. Rather, the millions of people traveling through the Airport expect that the federal government, working with state and local law enforcement, has taken all efforts to secure the entire Airport, not just at the security checkpoint. It is not within Georgia's power to set an artificial demarcation line at the security checkpoint, and doing so would certainly not make the traveling public feel safer.

The issue of whether a gun-carrier has a permit is irrelevant. Prudent security procedures would require law enforcement personnel to focus attention on any individual with a loaded gun in the airport, ***regardless*** of whether the person

has a permit.[21] The diversion of security resources away from existing security efforts would certainly impede and compromise security efforts.[22]

TSA regulations require each airport operator to have a security program that "must provide . . . [l]aw enforcement personnel in the number ***and manner*** adequate to support its security program." 49 C.F.R. § 1542.215(a)(1) (emphasis added). If loaded guns were allowed in the Airport, the Airport's ability to comply with this federal mandate would undoubtedly be constrained and compromised because it would also limit the range of security procedures available to Airport law enforcement personnel.

C. Plaintiffs' Arguments to the District Court on Preemption Are Unavailing

Plaintiffs' arguments to the District Court that H.B. 89 is not preempted by federal law are incorrect for several reasons.

First, Plaintiffs argued that H.B. 89 could not be preempted because H.B. 89 did not create a right to carry firearms in the Airport; rather, it "decriminalized

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[21] Federal law prohibits anyone from tampering, compromising, interfering or attempting to circumvent "any security system, measure, or procedure" implemented by the airport pursuant to these regulations. 49 C.F.R. § 1540.105(a)(1).

[22] Plaintiffs implicitly presuppose that individuals with permits to carry concealed, loaded guns never commit crimes and therefore Airport security would not need to be concerned about them. One need only look at the local news to understand that even permit holders commit violent crimes. Regardless, Airport security personnel cannot be expected to ignore the presence of an individual with a concealed, loaded gun in the Airport simply because the individual may have a permit.

carrying guns" in the airport. (R2-37-3.) According to Plaintiffs' contorted logic, H.B. 89 did not ***grant*** a right, rather, it removed a restriction, and therefore "there is . . . no state regulatory scheme for [Appellees] to worry about being preempted by federal law." *Id.*

Plaintiffs' artificial distinction that H.B. 89 "did not grant a right ... [i]t removed a restriction" is meaningless. (R2-37-2.) Not only does their semantic razor fail to split the hair, but it also fails to take a cut at the actual right-creating language of the statute, which expressly provides that:

> A person licensed or permitted to carry a firearm by this part ***shall be permitted*** to carry such firearm, subject to the limitations of this part ... in public transportation....

O.C.G.A. § 16-11-127(e) (emphasis added). There is no question that this affirmative language purports to grant a state-created right to carry concealed, loaded guns in public transportation. Plaintiffs' attempt to re-characterize H.B. 89 as an absence of regulation ignores the express terms of the statute, and, even if it were accurate, cannot save the statute from otherwise being preempted by federal law.

Second, Plaintiffs argued that H.B. 89 cannot be preempted because conflict preemption applies only "when it is impossible for a ***private*** party to comply with both state and federal law. (R2-37-6 (emphasis in original).) Not surprisingly, Plaintiffs did not cite any authority for this incorrect statement of law. Conflict

preemption does not depend on a party's identity, but instead exists if "state law stands as an ***obstacle*** to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373, 120 S.Ct. 2288, 2294 (2000) (emphasis added); *see also Fla. State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1157 (11th Cir. 2008). Plaintiffs ignore the issue of whether a state law that permitted concealed, loaded guns in the Airport would obstruct Congress's objective of maintaining safe airports.[23]

Third, Plaintiffs argued that federal law cannot preempt H.B. 89 because it would constitute an unconstitutional "federal mandate," and "the federal government has no power to press into service the officer or governments of the states." (R2-37-7.) This argument also misses the point because Defendants do not contend that "the federal government requires them to prohibit guns at the Airport." (R2-37-6-7.) Plaintiffs have the argument backwards because Congress has imposed no requirement on Georgia. Rather, Congress, under its plenary Commerce Clause powers, has enacted a pervasive regulatory regime for airport security, and individual states, under the constraints of the Supremacy Clause, cannot pass laws that create obstacles to the accomplishment of the full objectives of Congress. (R1-24-14-17.) Therefore, any state law – including H.B. 89 – that

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[23] Defendants have previously shown that a state law permitting individuals to carry concealed, loaded guns in the Airport would constitute an obstacle to the federal objectives of maintaining safe and secure airports and instilling public confidence in airport security. (R1-24-14-17.)

purports to permit concealed, loaded guns in the Airport is preempted by federal law because it creates an obstacle to the accomplishment of Congress's objective of maintaining safe and secure airports.

Plaintiffs also urged the District Court to conclude that federal law does not preempt H.B. 89 because "[i]t is far from clear that the manifest purpose of Congress was to preempt all state and local regulation of carrying guns in airports." (R2-37-5.) But unlike the Plaintiffs, the Court cannot ignore the terms of the ATSA, the comprehensive regulations promulgated pursuant to it, and the sweeping regulatory authority Congress granted to the TSA after September 11th. (R1-24-5-13.)

Lastly, Plaintiffs also argued generally that "[t]he carrying of firearms is historically a matter of state concern." (R2-37-4.) But this general point must give way to the specific issue in this case: whether the regulation of the nationally interconnected network of airports and aviation security – the regulated field – is a federal concern and within Congress's power to regulate. The ATSA, the 9/11 Commission Act, the Federal Aviation Administration ("FAA") enabling statutes, and the extensive TSA and FAA regulations clearly establish that the issue is a federal concern. (R1-24-5-13.) As the Supreme Court observed, "[p]lanes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified

personnel and under an intricate system of federal commands." *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633-34, 935 S.Ct. 1854, 1860 (1973) (holding that local ordinance regarding aircraft schedules is preempted by federal law). Congress has occupied the field of airport safety and security, and the State of Georgia cannot interfere with Congress's regulatory scheme by purporting to establish a state-created right that would allow individuals to carry concealed, loaded guns in the Airport.

CONCLUSION

For the reasons set forth above, the Defendants respectfully request that the District Court's Order granting their Motion for Judgment on the Pleadings be affirmed.

[SIGNATURES ON NEXT PAGE]

Respectfully submitted this 17th day of December, 2008.

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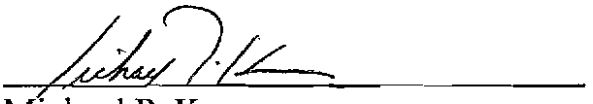
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B)(i) and Eleventh Circuit Rule 32-4, the foregoing brief complies with the type-volume limitations and does not exceed 14,000 words. The brief (including footnotes) contains 9,610 words, excluding the parts of the brief exempted by the Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Eleventh Circuit Rule 32-4.

This 17th day of December, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that on this day I served a copy of the within and foregoing **BRIEF OF DEFENDANTS-APPELLEES** via United Stated mail, properly addressed and with first class postage prepaid, to the following attorney of record:

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This 17th day of December, 2008.

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