**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

| | | |
|---|---|---|
| **GEORGIACARRY.ORG, INC., et al.** | ) | |
| | ) | |
| **Plaintiffs and Counterclaim-Defendants,** | ) | **CIVIL ACTION FILE** |
| | ) | |
| | ) | **NO. 1:08-CV-2171-MHS** |
| **vs.** | ) | |
| | ) | |
| **THE CITY OF ATLANTA, et al.** | ) | |
| | ) | |
| **Defendants and Counterclaim-Plaintiffs.** | ) | |

# DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**STATUTES**

**OTHER AUTHORITIES**



**RULES**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

| | | |
|---|---|---|
| **GEORGIACARRY.ORG, INC., et al.** | ) | |
| | ) | |
| **Plaintiffs and Counterclaim-Defendants,** | ) | **CIVIL ACTION FILE** |
| | ) | |
| | ) | **NO. 1:08-CV-2171-MHS** |
| **vs.** | ) | |
| | ) | |
| **THE CITY OF ATLANTA, et al.** | ) | |
| | ) | |
| **Defendants and Counterclaim-Plaintiffs.** | ) | |

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS**

Plaintiffs allege that they have the unrestricted right to carry loaded guns at the world's busiest airport and have asserted five claims for declaratory judgment in an attempt to prevent anyone from stopping them – asserting one violation of O.C.G.A. § 16-11-173, and four violations of the United States Constitution: the Militia Clause, Equal Protection, Fourth Amendment, and Due Process. Plaintiffs' lawsuit is legally baseless because each claim is dependent on the false legal assumption that state law – 2008 Georgia Laws Act 802 ("H.B. 89") – allows them to "legally carry [] firearms in the airport." (Am. Compl. ¶¶ 30-35.) The assumption is false because Congress has preempted the field of airport safety and

security regulation with a pervasive and comprehensive regulatory scheme designed to protect visitors and passengers at our nation's airports, and, in any event, Georgia law does not create the right Plaintiffs assume. Specifically, Plaintiffs' claims fail as a matter of law for the following reasons:

***First***, Congress has the power to regulate safety and security measures at our nation's airports and to preempt state law regulation of this field. Congress has 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. 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 Hartsfield-Jackson Atlanta International Airport ("Airport") or otherwise regulate the use of guns at the Airport.

***Second***, 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. In fact, other Georgia statutes –the "public gathering" law (O.C.G.A. § 16-11-127) and Georgia's Transportation Passenger Security Act of 2002

(O.C.G.A. § 16-12-122 *et seq*.) – prohibit Plaintiffs from carrying concealed, loaded guns in the Airport.

***Third***, Plaintiffs have failed to plead any cognizable claim under the U.S. Constitution because they have no right to carry loaded guns at the Airport under the Militia Clause or Fourteenth Amendment, they have not been subject to unequal treatment, they have not been deprived of any property interest or due process, and they have not been subjected to any unreasonable search or seizure.

## ARGUMENT AND CITATION OF AUTHORITIES

Judgment on the pleadings under Fed. R. Civ. P. 12(c) is proper when there are no material facts in dispute, and judgment may be rendered considering the pleadings and any judicially noticed facts. *Horsley v. Rivera*, 292 F.3d 695, 700 (11th Cir. 2002). These criteria are satisfied here.

### I. Plaintiffs Have No State-Created Right to Carry Concealed, Loaded Guns in the Airport

Plaintiffs' five claims each assumes that the State of Georgia has the power to create a right for people to carry concealed, loaded guns in certain areas of the Airport, and they assume that H.B. 89, in fact, creates such a right. Congress, however, has preempted the field of airport safety and security, a power it unquestionably has under the Supremacy Clause of Article VI of the U.S. Constitution.

As the Supreme Court has noted, "[a] fundamental principle of the Constitution is that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Federal agencies, exercising congressionally delegated powers, similarly may preempt state law. *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 369 (1986) ("[A] federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.") (citing *Fidelity Fed. Sav. & Loan Ass'n. v. De la Cuesta*, 458 U.S. 141 (1982)). It is undisputed that Congress, the TSA, and airport operators, who act pursuant to authority from Congress or the TSA, have the power to prohibit guns in airports. Consequently, any state law that purports to regulate in this area would be preempted by federal law.

### 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 (1990); *Crosby,* 530 U.S. at 372. 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.[1]

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

[1] 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).

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 [ATSA] to improve security in the nation's transportation system. In order to achieve this goal, Congress created the Transportation Security Administration within the Department of Transportation and charged it with assuring 'security in all modes of transportation.'") (citation omitted).

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).[2]

[2] 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

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

---

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).

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).[3] This regulatory authority extends to the "airport perimeter," and Congress mandated that the Under Secretary require 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.

---

[3] 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.

*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.); *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.");[4] *id.* at 4 ("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***

[4] *See One Year Later: Have TSA Airport Security Checkpoints Improved?*, *Hearing Before the H. Comm. On Oversight and Gov't Reform*, 110th Cong. 2 (2007) (testimony of Kip Hawley, Assistant Sec'y, Transp. Sec. Admin., Dep't of Homeland Sec.) ("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***…."); *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. *See 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).

***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).

> 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).[5] 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.

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 *et seq*, 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.

---

[5] 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) (emphasis added).

### 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 (1973) (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (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 (1988).

The ATSA and TSA regulations embody Congress's paramount national security objectives with respect to airport safety and security. *See, e.g.*, *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….").[6]

### 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

[6] 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 (2004); *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 98 (1983).

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.[7]

**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 (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

[7] 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.

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.[8]

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 otherwise safe and secure environment. Allowing individuals to carry these deadly weapons to 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

---

[8] 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.").

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.[9] The diversion of security resources away from existing security efforts would certainly impede and compromise security efforts.[10]

---

[9] 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).

[10] 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

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.

## II. Defendants Are Entitled to Judgment on the Pleadings Because House Bill 89 Does Not Apply to Airports

H.B. 89 amended O.C.G.A. § 16-11-127 to provide that a person licensed to carry a firearm shall be permitted to carry it "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). H.B. 89 does not use the term "airport." Therefore, H.B. 89 applies to airports ***only*** if airports fall within the undefined term "public transportation."

A reasonable interpretation of "public transportation," in the context of H.B. 89's permission to carry guns, does not include an airport. First, air travel is not

---

a concealed, loaded gun in the Airport simply because the individual may have a permit.

***"public"*** transportation. The airlines are not owned or operated by any governmental entity, as is the case with MARTA. Second, an airport is not public ***"transportation"*** because, as Plaintiffs concede, a passenger cannot carry a gun onto an airplane. Thus, the only individuals who could even arguably carry a gun into the Airport are ***non-traveling*** individuals. It would therefore be illogical to conclude that a provision purportedly applying to "transportation" was meant to cover non-traveling individuals – where it is undisputed that traveling individuals are not covered. Therefore, H.B. 89 does not apply to airports.

In addition, the Georgia Transportation Passenger Security Act of 2002 ("2002 Act") prohibits an individual from carrying a gun into an airport; it prohibits "introducing into a terminal" a firearm, and "terminal" is defined to include 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. §§ 16-12-127, 16-12-122(10). H.B. 89 permits guns "in public transportation." The phrase "public transportation" is absent in the 2002 Act, which instead expressly prohibits "introducing [a firearm] into a terminal." O.C.G.A. § 16-12-127. Therefore, the Georgia legislature plainly intended the scope of H.B. 89 to be different than the scope of the 2002 Act –

otherwise, the two pieces of legislation would have used the same terms. Accordingly, H.B. 89 did not repeal the 2002 Act as it applies to airports.

It is reasonable to conclude that the intent of the Georgia legislature in using the term "public transportation" in H.B. 89 (as opposed to the "introduction into a terminal" language) was to legislate the carrying of guns on the actual mode of transportation. In other words, H.B. 89 permits guns on buses and trains (*i.e.*, "public transportation"). By stark contrast, federal law explicitly prohibits guns on airplanes. 49 C.F.R. § 1540.111. Indeed H.B. 89 provides "that a person shall not carry a firearm into a place prohibited by federal law," O.C.G.A. § 16-11-127(e), an explicit recognition that guns are not permitted in "transportation" where the federal government prohibits them. Accordingly, H.B. 89 does not create a right for a non-traveling individual to carry a gun at an airport. Instead, such an individual is prohibited from bringing a loaded gun into the Airport by the 2002 Act. O.C.G.A. § 16-12-127.

Plaintiffs concede that, since at least 1976, guns were prohibited in the Airport pursuant to O.C.G.A. § 16-11-127(a), which prohibited firearms at a "public gathering." O.C.G.A. § 16-11-127(a). "Public gathering" is defined to include "publicly owned or operated buildings" and it is undisputed that the Airport is a publicly owned or operated building. O.C.G.A. § 16-11-127(b). H.B.

89 did not amend this portion of O.C.G.A. § 16-11-127, and if the Georgia legislature intended to repeal or amend the "public gathering" prohibition as applied to airports, it would have done so in H.B. 89.[11] It did not. Therefore, because H.B. 89 did not repeal the "public gathering" law as it applies to airports, guns are also prohibited in the Airport pursuant to O.C.G.A. § 16-11-127(a).[12]

## III. Defendants Are Entitled to Judgment on the Pleadings on Each Individual Claim

Because all five of Plaintiffs' claims depend on the false assumptions that Georgia can create a right to carry loaded guns at the Airport, and that Georgia has, in fact, created such a right, their claims fail as a matter of law. Each claim fails as a matter of law for additional reasons, described below.

### A. O.C.G.A. § 16-11-173 (Count 1)

Plaintiff's reliance on O.C.G.A. § 16-11-173, which prohibits municipal corporations from regulating the possession of firearms, is misplaced. The City

---

[11] The language of H.B. 89 further demonstrates that the Georgia legislature did not intend to amend or alter the "public gathering" prohibition because the provision on firearms referenced a different code section. *See* H.B. 89 (provision applies "notwithstanding Code Sections 16-12-122 through 16-12-127."). In other words, H.B. 89 specifically excludes the public gathering provisions of O.C.G.A. § 16-11-127.

[12] The City's position that passengers may include unloaded guns in checked baggage is not an acknowledgment that the 2002 Act repealed the "public gathering" law. *See* Plaintiffs' PI Brief, pp. 13-14. Passengers may include unloaded guns in checked baggage pursuant to federal law, not state law. 49 C.F.R. § 1540.111(c).

has not violated O.C.G.A. § 16-11-173 because the City's policy on firearms in the Airport is nothing more than an act in compliance with the mandate of federal law to establish and carry out an airport security plan to ensure the safety of individuals at the Airport. 49 U.S.C. §§ 44903(c), 44903(h); 49 C.F.R. § 1542.101. Therefore, Plaintiffs have no claim for a violation of O.C.G.A. § 16-11-173.

**B. Militia Clause (Count 2)**

Plaintiffs' Militia Clause claim relies exclusively on the militia clause in Article I, sec. 8, cl. 16 – not on the militia clause of the Second Amendment.[13] The militia clause, on its face, is not a source of substantive rights. U.S. Const., art. I, sec. 8, cl. 16 (giving Congress the power to "provide for organizing, arming, and disciplining, the Militia") (emphasis added).[14] Rather, as its language suggests, the militia clause is a source of congressional authority. *Id.*

---

[13] *See generally* Am. Compl. (removes Second Amendment claim).

[14] U.S. Const., art I, sec. 8, cl. 16 ("To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.")

### C. Equal Protection (Count 3)

Plaintiffs assert an Equal Protection claim on the basis that the City of Atlanta allows passengers transporting ***unloaded*** guns in checked baggage to bring guns into the Airport, but prohibits non-traveling individuals from carrying guns in the Airport. (Am. Compl. ¶ 32.) Plaintiffs have no Equal Protection claim because Plaintiffs, as non-traveling individuals, are not similarly situated to traveling passengers. *Strickland v. Alderman*, 74 F.3d 260, 264 (11th Cir. 1996) (plaintiff must establish it was treated different than similarly situated person). Under certain conditions, federal law – not the City – allows individuals transporting guns in checked baggage to bring such guns – ***unloaded*** – into the airport. 49 C.F.R. § 1540.111(c). *See also E&T Realty v. Strickland*, 830 F.2d 1107, 1109 (11th Cir. 1987) ("Different treatment of dissimilarly situated persons does not violate the equal protection clause.").

### D. Fourth Amendment (Count 4)

Plaintiffs have not been detained, searched or arrested. A mere ***threat*** to arrest, without more, does not give rise to a Fourth Amendment claim. *See United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("We conclude that a person has been 'seized' within the meaning of the Fourth Amendment ***only if***, in view of all of the circumstances surrounding the incident, a reasonable person would have

believed that he was not free to leave.") (emphasis added); *Sterne v. Thompson*, No. 1:05 CV 477 JCC, 2005 WL 2563179, at * 4 (E.D. Va. Oct. 7, 2005) ("Turning first to the plaintiff's allegations that [defendant] threatened to arrest him, the complaint contains no allegation that any of the defendants ever detained the plaintiff in any manner or for any length of time. In other words, because the plaintiff alleges no actual arrest or even a *Terry* stop, there is no allegation of a seizure of the plaintiff's person. ***Where there is no search or seizure at all, the Fourth Amendment's protections are not triggered***.") (citing *United States v. Young*, 105 F.3d 1, 5-6 (1st Cir. 1997)) (emphasis added).[15]

**E. Due Process (Count 5)**

Plaintiffs claim that they have the "right[] to bear arms that existed prior to the passage of the Second Amendment." (Am. Compl. ¶ 34.) Regardless of any general pre-constitutional right, there was no specific pre-constitutional right to carry loaded guns in (non-existent) airports. *See Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality) ("We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be

[15] *Rodgers v. Lincoln Towing Serv., Inc*., 771 F.2d 194, 200 (7th Cir. 1985) (noting that no fourth amendment violation occurred when police called plaintiff and threatened to arrest him if he failed to come to the police station).

identified."). Nor is any right to carry deadly weapons unqualified, as the Supreme Court recently noted:

> "Like most rights, the right secured by the Second Amendment is ***not unlimited***. From Blackstone through the 19th-century cases, commentators and courts routinely explained that ***the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose***....For example, the majority of the 19th-century courts to consider the question held that ***prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues***….[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or ***laws forbidding the carrying of firearms in sensitive places*** such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms."

*District of Columbia v. Heller*, 128 S.Ct. 2783, 2816-17 (2008) (emphasis added). Plaintiffs claim that the Airport security measures deprive them "of a portion of their property interest" in their Georgia firearm licenses without due process of law. (Am. Compl. ¶ 35.) Under the *Mathews v. Eldridge* balancing test, Plaintiffs are not entitled to any further protections. 424 U.S. 319, 335 (1976) (noting that to determine what process is due, court must balance (1) the property interest; (2) the value of a procedure in protecting that right; and (3) the efficiency interests of the government in providing the procedure). Plaintiffs' property interest in this case is non-existent. Plaintiffs still have their firearms, their firearm permits, and may carry weapons in the vast majority of places in the State of Georgia. They have no

right to carry loaded guns in the Airport, and the inability to carry a loaded gun in the Airport no more interferes with the property interest in a firearm license than a detour sign interferes with the property interest in a driver's license.

Further, an additional procedure would be devoid of any value. In compliance with federal law, the Airport has a generally applicable regulation barring firearms. Any individualized hearings would be pointless. *See Carey v. Piphus*, 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."). Finally, it would be extraordinarily inefficient to conduct a hearing for every individual that wanted to violate Airport security regulations – especially since the applicability of the regulation does not turn on any specific facts that could be uncovered at a hearing. *See Bi-Metallic Inv. Co. v. State Bd. Of Equalization*, 239 U.S. 441, 445 (1915) (noting that in the context of rules of general applicability, "there must be a limit to individual argument in such matters if government is to go on.") (Holmes, J.). Accordingly, Plaintiffs' procedural and substantive due process claims should fail.

## CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant their Motion for Judgment on the Pleadings.

Respectfully submitted this 1st day of August, 2008.

/s/ Michael P. Kenny
Michael P. Kenny
Georgia Bar No. 415064
Christopher A. Riley
Georgia Bar No. 605634
Erica L. Fenby
Georgia Bar No. 402030

ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, GA 30309-3424
(404) 881-7000
(404) 881-7777 (facsimile)
mike.kenny@alston.com

*Attorneys for Defendants City of Atlanta, Mayor Shirley Franklin, Ben DeCosta, and Hartsfield-Jackson Atlanta International Airport*

/s/ Yonette Buchanan
Yonette Buchanan
Georgia Bar No. 623455
Joshua D. Jewkes
Georgia Bar No. 110061

ASHE, RAFUSE & HILL, LLP
1355 Peachtree Street, N.E.
Suite 500
Atlanta, Georgia 30309
(404) 253-6005
(404) 253-6060 (facsimile)
yonettebuchanan@asherafuse.com

*Attorneys for Defendants City of Atlanta, Mayor Shirley Franklin, Ben DeCosta, and Hartsfield-Jackson Atlanta International Airport*

## CERTIFICATION OF COMPLIANCE

I hereby certify that, pursuant to Local Rule 7.1D, the foregoing **DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS** has been prepared in Times New Roman, 14-point font, in conformance with Local Rule 5.1C.

/s/Michael P. Kenny

**CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the within and foregoing **DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

JOHN R. MONROE
Attorney at Law
9640 Coleman Road
Roswell, Georgia 30075
john.monroe1@earthlink.net

This 1st day of August, 2008.

/s/Michael P. Kenny