IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SARA CARTER and GEORGIACARRY.ORG, INC.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION FILE NO.:
	)	
vs.	)	1:20-cv-1517-SCJ
	)	
BRIAN KEMP and PINKIE TOOMER,	)	
	)	
Defendants.	)	

BRIEF IN SUPPORT OF GOVERNOR KEMP'S
MOTION TO DISMISS PLAINTIFFS' COMPLAINT

COMES NOW Defendant Brian Kemp, Governor of the State of Georgia, and files this Brief in support of his Motion to Dismiss Plaintiffs' Complaint, showing the Court as follows:

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Sara Carter and GeorgiaCarry.Org, Inc. filed the underlying 42 U.S.C. § 1983 lawsuit against Governor Kemp and Judge Pinkie Toomer, alleging that they violated the Second and Fourteenth Amendments and state law by restricting Plaintiff Carter's ability to obtain a Georgia weapons carry license ("GWL"), or alternatively, to carry weapons without a GWL, during the current health crisis and state of emergency. (Docs. 1, 23).

Allegations of Plaintiffs' Complaint

With regard to Governor Kemp specifically, Plaintiffs allege that he is the chief executive officer for the State of Georgia and obligated to ensure that laws are faithfully executed. (Doc. 1, p. 2). Plaintiffs further allege that Governor Kemp declared a public health state of emergency on March 14, 2020 due to the rapid spread of COVID-19, which prompted the Supreme Court of Georgia to issue a judicial emergency declaration that paused all non-essential judicial functions and proceedings during the state of emergency. (*See* Docs. 1, 3, 12; *see also* Doc. 9, pp. 3-7). The public health state of emergency and judicial emergency declarations are based on the continued transmission of COVID-19 throughout the State of Georgia in an effort to protect the health, safety, and welfare of all Georgia citizens and visitors. (*See* Doc. 9, pp. 3-10). Plaintiffs allege that in response to the judicial emergency declaration, the probate court of Fulton County, Georgia, temporarily suspended the acceptance of GWL applications.[1] (Doc. 1, p. 4).

Plaintiffs allege that in order to carry a weapon outside of one's home, automobile, or place of business, individuals must have a GWL. Plaintiff Carter alleges that she does not have a GWL but believes she would qualify for one if the probate court were accepting applications. (*Id.*, p. 5). Plaintiffs allege that without

[1] The temporary suspension of accepting GWL applications does not impact renewals of GWLs—renewal deadlines were instead tolled by the judicial emergency declaration. (*See* Doc. 9, p. 12).

a GWL, Plaintiff Carter could be charged with a misdemeanor pursuant to O.C.G.A. § 16-11-126. (Doc. 1, p. 4). Plaintiffs allege that the state "routinely enforces" O.C.G.A. § 16-11-126, and that they sent a letter to Governor Kemp asking him to suspend enforcement of O.C.G.A. § 16-11-126, but he has failed to do so. (*Id.*, p. 5). Because the Fulton County probate court is not currently accepting applications for GWLs and O.C.G.A. § 16-11-126 prohibits individuals from carrying weapons without a GWL, Plaintiffs contend that they are effectively prevented from bearing arms in violation of the Second and Fourteenth Amendments, as well as state law. (*Id.*, pp. 5-7). In relief, Plaintiffs seek (1) a declaration against Governor Kemp that the enforcement of O.C.G.A. § 16-11-126 is unconstitutional as applied because it violates the right to due process and to bear arms if it is not reasonably possible to obtain a GWL, and (2) an injunction against Governor Kemp prohibiting the enforcement of O.C.G.A. § 16-11-126.[2] (Doc. 1, pp. 7-8).

[2] Plaintiffs also seek attorney's fees against both Defendants, as well as mandamus relief pursuant to state law and declaratory relief against Judge Toomer. (Doc. 1, pp. 7-8). In addition, Plaintiffs filed a Motion for Temporary Restraining Order, which this Court denied. (Docs. 3, 12, 18, 35).

Evidence Regarding O.C.G.A. § 16-11-126 Enforcement[3]

The Department of Public Safety ("DPS") is comprised of the Georgia State Patrol, Georgia Capitol Police, and the Motor Carrier Compliance Division ("MCCD"), with 1,071 law enforcement officers posted in regions across the State of Georgia. (*See* Declaration of Sergeant First Class Gary Langford, attached hereto as Exhibit 1, ¶ 2). Under Georgia law, a person carrying a weapon is not subject to detention for the sole purpose of investigating whether they have a weapons carry license. (*Id.*, ¶ 4). DPS Officers are taught that they may not detain an individual to investigate whether the individual has a Georgia weapons license and that they should treat every encounter with an individual possessing a weapon as though that individual has a license. (*Id.*, ¶¶ 6-9). Officers patrolling Capitol Square do not investigate whether an individual has a weapons license unless the officer has a minimum of reasonable, articulable suspicion that a crime—separate from any weapons carry license violation—is being committed or has been committed. (*Id.*, ¶ 7). Officers at the Capitol have been instructed that when members of the public carry weapons inside the Capitol, up to the screening

[3] This Court may consider facts outside of the pleadings in ruling on a Rule 12(b)(1) motion to dismiss. *See, e.g., Bryant v. Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008) (". . . it is well-established that a judge may make factual findings about subject matter jurisdiction on a Rule 12(b)(1) motion to dismiss.") (citing *Williamson v. Tucker*, 645 F.2d 404, 412-13 (5th Cir. 1981)).

checkpoint, those individuals have a right to retreat to put the weapon back in their vehicle; they do not ask whether the individual has a Georgia weapons license. (*Id.*, ¶ 8). State Trooper and MCCD Officers do not investigate whether a motorist has a Georgia weapons carry license during a traffic stop for minor traffic violations. (*Id.*, ¶ 10). State Troopers are instructed that if they pull someone over in their vehicle, and the individual has a weapon, the traffic stop alone is not sufficient to investigate whether or not the individual has a Georgia weapons license, even if the individual has exited the vehicle with their weapon. (*Id.*, ¶¶ 9-10). If a weapon is possessed by an occupant of a vehicle during a traffic stop and the reason for the stop escalates, then the DPS officers may further investigate the lawfulness of possession of the weapon. (*Id.*, ¶ 10). With escalations, a citation for violation of O.C.G.A. § 16-11-126 is generally a lesser included charge. For example, an escalation would arise when an occupant's status would make the possession of the weapon illegal, including possession by a convicted felon or possession by a minor under the age of 18. An escalation could also arise when there is reasonable articulable suspicion or probable cause of other criminal activity, such as possession during the commission of certain crimes, which would include theft of the motor vehicle. (*Id.*)

For the last two years, the Georgia State Patrol has issued a total of 14 citations for the offense of carrying a weapon without a license in violation of

O.C.G.A. § 16-11-126, and 3 of the 14 total citations were issued to 1 individual at the time of a single arrest. (*Id.*, ¶¶ 13-14). Each time a citation was issued for the offense of carrying a weapon without a valid weapons-carry license, citations were also issued for other distinct offenses that resulted in an arrest. (*Id.*, ¶¶ 15-16). The Georgia Capitol Police and MCCD have not issued any citations for a violation of O.C.G.A. § 16-11-126 in the past two years. (*Id.*, ¶ 12).

For the reasons that follow, Plaintiffs' Complaint against Governor Kemp should be dismissed.

ARGUMENT AND CITATION TO AUTHORITY

Plaintiffs' Complaint should be dismissed for lack of subject matter jurisdiction and failure to state a claim. As an initial matter, Plaintiffs lack standing to bring this action against Governor Kemp because they have suffered no concrete injury which is traceable to any action taken by Governor Kemp. In addition, Plaintiffs' claims against Governor Kemp are barred by the Eleventh Amendment and do not fit within the *Ex Parte Young* exception to the immunity bar. Plaintiffs' claims are further barred by the Eleventh Amendment because the gravamen of Plaintiffs' complaint is a matter of state law. Notwithstanding the lack of subject matter jurisdiction, Plaintiffs also fail to state a claim against Governor Kemp based on the alleged violation of the Fourteenth Amendment. In addition, any claim for monetary damages is barred by qualified immunity.

I. Plaintiffs' Complaint Should be Dismissed for Lack of Subject Matter Jurisdiction.

A complaint is subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(1) where the district court lacks subject matter jurisdiction

A. Plaintiffs Lack Standing To Challenge O.C.G.A. § 16-11-126.

Article III of the Constitution restricts judicial power "to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009). "Standing doctrine 'reflect[s] this fundamental limitation' and 'requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant . . . invocation of federal court jurisdiction.'" *Ga. Republican Party v. SEC*, 888 F.3d 1198, 1201 (11th Cir. 2018) (quoting *Summers*, 555 U.S. at 492). This limitation is "founded in concern about the proper – and properly limited – role of the courts in a democratic society." *Summers*, 555 U.S. at 492.

The party invoking federal jurisdiction bears the burden of establishing standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Standing elements are "not mere pleading requirements, but rather an indispensable part of the plaintiff's

case," and the manner and degree of evidence required to demonstrate the existence of standing varies depending upon the stage of the litigation. *Ga. Republican Party*, 888 F.3d at 1201.

> It is by now well settled that "the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact'--an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

U.S. v. Hays, 515 U.S. 737, 742-743 (1995) (quoting *Lujan*, 504 U.S. at 560-561). A "plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)).

Here, Plaintiffs cannot demonstrate standing because they have failed to articulate any concrete injury or demonstrate facts sufficient to establish a causal connection that is "fairly traceable" to Governor Kemp.[4]

[4]While Georgiacarry.org Inc. is identified as a Plaintiff in this suit, the Complaint includes absolutely no allegations regarding any injury *or* claims on behalf of Georgiacarry.org Inc. *See* Doc. 1, ¶¶ 5-6 (describing Georgiacarry.org Inc. as a Plaintiff and describing its mission); ¶43 (describing Due Process claim as Defendants allegedly "violating Carter's right to Due Process."); ¶ 46 (describing Second Amendment claim as premised solely on Plaintiff Carter's inability to obtain a GWL). Whether proceeding on a diversion of resources theory or an associational standing theory, Plaintiffs' Complaint fails to establish that Georgiacarry.org has standing to proceed as a Plaintiff. *See Jacobson v. Florida*

The Lack of a Concrete Injury

The Supreme Court has "repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct as sufficient for standing to invoke the federal judicial power." *Hays*, 515 U.S. at 743. An injury in fact must be concrete. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016). "A 'concrete' injury must be 'de facto'; that is, it must actually exist." *Id.* (quoting Black's Law Dictionary 479 (9th ed. 2009)). The Supreme Court has explained:

> When we have used the adjective "concrete," we have meant to convey the usual meaning of the term — "real," and not "abstract." Webster's Third New International Dictionary 472 (1971); Random House Dictionary of the English Language 305 (1967). Concreteness, therefore, is quite different from particularization.

Spokeo, 136 S. Ct. at 1548.

Here, as in *Spokeo*, Plaintiffs have failed to articulate any concrete injury. Instead, Plaintiff Carter's "fear of arrest and prosecution if she carries a handgun outside her home, motor vehicle, or place of business without a GWL" (Doc. 1, ¶ 35) is speculative and not reasonable in light of state law *prohibiting* law enforcement officers from detaining Plaintiff to inquire about her permit. *See* O.C.G.A. § 16-11-137(b). In addition, although Plaintiffs characterize the requested relief as necessary to practice self-defense in public, Georgia law already

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Secretary of State, 2020 U.S. App. LEXIS 13714 *22-27 (11th Cir. April 29, 2020).

provides an "absolute defense" to any violation of O.C.G.A. § 16-11-126 where the individual is acting in the "[d]efense of self or others." O.C.G.A. § 16-11-138; *see also Johnson v. State*, 2020 Ga. LEXIS 136, at *6-7 (Feb. 28, 2020).[5] Defendant recognizes that an "actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging [the] law." *Driehaus*, 573 U.S. at 158-159. However, there must be "a credible threat of prosecution" under the challenged statute. *Id.* at 159 (quoting *Babbitt* v. *Farm Workers*, 442 U. S. 289, 298 (1979)). Here, there is no threat of prosecution because law enforcement officers are prohibited by statute from detaining anyone for the purpose of establishing whether they have a license. Unless law enforcement has "a minimum of reasonable, articulable suspicion that a crime is being committed or has been committed," (Exhibit 1, ¶¶ 7, 10) there is no possibility of arrest and prosecution. In fact, during the past two years, the Department of Public Safety ("DPS") has only issued fourteen (14) citations, to twelve (12) individuals, for violation of O.C.G.A. § 16-11-126(h). In each case, the underlying cause of the traffic stop

[5] This exception even applies to possession of weapons by a felon during the period of self-defense. Of course, for a felon, possession of a weapon "prior to any necessity arising and . . . after any necessity dissipated . . . would be felonious and prosecutable." *Johnson*, 2020 Ga. LEXIS 136 at *7 n. 7; *see also State v. Remy*, 2020 Ga. LEXIS 178 (March 13, 2020). In the absence of a statutory prohibition to the possession of a weapon, independent from simply the licensure requirement, Defendant is not aware of any cases applying this same before-during-after analysis to the application of O.C.G.A. § 16-11-138.

was the suspected commission of a separate and distinct criminal offense. (Exhibit 1, ¶ 16). DPS trains its officers to "treat every encounter with an individual possessing a weapon as though that individual has a Georgia weapons license." (*Id.*, ¶ 6). State Troopers are similarly "instructed that if they pull over a vehicle, and the driver or passenger has a weapon, the traffic stop is *not* sufficient to investigate whether or not the individual has a Georgia weapons carry license, even if the individual has exited the vehicle with their weapon."[6] (*Id.*, ¶ 9).

Under these circumstances, a generalized fear that Plaintiff Carter will be prosecuted for carrying a gun without a license, and prior to the expiration of the state of emergency, is not sufficiently concrete to confer standing. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013) (rejecting "reasonable likelihood" of injury as sufficient to meet the injury in fact standard). Here the Complaint seeks to address purely speculative injuries.

There is No Causal Connection

Even if Plaintiffs' fear of prosecution were more than speculative, the injuries are not "fairly . . . traceable" to Governor Kemp's conduct "as opposed to the action of . . . a third party." *Lewis v. Governor of Alabama*, 944 F.3d 1287,

[6] Of course, DPS has no control over local law enforcement agencies. However, the statutory prohibition on detention solely to investigate whether someone has a license is equally applicable to other law enforcement agencies. Moreover, the burden is on Plaintiffs to demonstrate a concrete injury, not on Defendant to disprove injury. *Lujan*, 504 U.S. at 561.

1296 (11th Cir. 2019) (*en banc*); *see also Jacobson*, 2020 U.S. App. LEXIS 13714 *29-30; *Clapper*, 568 U.S. at 411 (holding that speculation about whether Plaintiffs would be subjected to surveillance under the challenged federal statute, "or some other authority—shows that [Plaintiffs] cannot satisfy the requirement that any injury in fact must be fairly traceable to" the challenged statute). Plaintiffs do not contend that the statutory framework is unconstitutional, either as a facial or as applied matter. Rather, they contend that contrary to the express language in O.C.G.A. § 16-11-129, another government actor has suspended accepting GWL applications due to a judicial state of emergency. The relief Plaintiffs seek however, is to enjoin the enforcement of O.C.G.A. § 16-11-126. The Eleventh Circuit's recent decision in *Jacobson* reaffirms that "[t]o satisfy the causation requirement of standing, a plaintiff's injury must be 'fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party.'" *Id*. at 29 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Relying on *Lewis v. Governor of Alabama*, 944 F.3d 1287, 1296 (11th Cir. 2019) (*en banc*), the *Jacobson* Court held that a state official's general supervisory responsibility for the administration of various statutes was insufficient to meet the causation prong of the standing requirement. *Id*. at 31-32. Similarly, here, the Governor's general authority to enforce the laws of Georgia, is insufficient to satisfy the causation prong of standing. As in *Jacobson*, here,

"[b]ecause the [Defendant] didn't do (or fail to do) anything that contributed to [Plaintiffs'] harm," Plaintiffs "cannot meet Article III's traceability requirement." *Id.* at 30 (quoting *Lewis*, 944 F.3d at 1301).

Here, any potential injury to Plaintiffs must be traced to the suspension of processing GWL applications during a state of emergency and not to the general, and lawful, license requirement and the statutory framework for obtaining a license.[7] It is clear that Plaintiffs' claims are premised on the Supreme Court of Georgia's judicial emergency declaration and subsequent determination of the judiciary that processing GWL applications is not an essential judicial function during the COVID-19 global health crisis. However, Governor Kemp does not exercise control over the judiciary or otherwise direct the judiciary's decision-making or court operations. To do so would violate the separation of powers mandated by Georgia's Constitution:

> The legislative, judicial, and executive powers shall forever remain separate and distinct; and no person discharging the duties of one shall at the same time exercise the functions of either of the others except as herein provided.

Ga. Const. Art. I, Section II, Para. III.[8] This doctrine of separation of powers "invests those officials charged with the duty of administering justice according to

[7] Nothing in the Governor's Executive Order expressly addresses the issuance of Georgia weapons permits.

[8] Under the Georgia Constitution, the General Assembly has express authority to "prescribe the manner in which arms may be borne." Ga. Const. Art. I, Section I,

law with all necessary authority to efficiently and completely discharge those duties the performance of which is by the constitution committed to the judiciary, and to maintain the dignity and independence of the courts." *Lovett v. Sandersville R.R.*, 199 Ga. 238, 239-240 (1945); *see also Cormier v. Horkan*, 2010 U.S. Dist. LEXIS 12146, at *22-23 (M.D. Ga. 2010) (rejecting claim that Governor had supervisory authority over judiciary as a matter of law) (vacated and remanded on other grounds).

Without question, Governor Kemp was well within his authority to declare a public health state of emergency. *See* O.C.G.A. § 38-3-2(a)(2), § 38-3-3(6), (7), § 38-3-51. Plaintiffs do not allege otherwise. Significantly, it was also within the judiciary's authority to declare a judicial state of emergency and for courts throughout the State to make determinations regarding how to proceed under the state of emergency—including which functions are essential—in order to protect the health, safety, and welfare of court employees and the public. *See* O.C.G.A. § 38-3-60, § 38-3-61(a); *see also Wallace v. Wallace*, 225 Ga. 102, 111, 166 S.E.2d 718, 724 (1969) (discussing the inherent powers of the judiciary, including "the authority to perform any function reasonably necessary to effectuate its jurisdiction, improve the administration of justice, and protect the judiciary as an

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Para. VIII. The General Assembly established a framework and tasked the probate courts with issuing licenses as set forth in O.C.G.A. § 16-11-129.

independent department of the government"); O.C.G.A. § 15-1-3. Governor Kemp does not, and cannot, control how the judiciary manages its courts and judicial functions during this unprecedented health crisis.

Plaintiffs alternatively request that the Court order Governor Kemp to suspend enforcement of O.C.G.A. § 16-11-126, which requires a valid GWL in order to carry a weapon in certain circumstances.[9] However, even assuming arguendo that the Governor had such authority, Plaintiffs cite no authority to support the notion that a Governor can be forced to suspend a valid state law on grounds that Plaintiffs disagree with the operational decisions of a county probate court.[10] Plaintiffs do not claim that O.C.G.A. § 16-11-126 is unconstitutional. They instead argue that it violates the Second Amendment 'as applied' because the probate court will not let them apply for a GWL during the state of emergency. Plaintiffs seek an Order enjoining the State Defendant from enforcement of O.C.G.A. § 16-11-126, "[b]ut what, exactly, do they say the [State Defendant] did wrong – how, exactly, do they trace their injuries to his 'conduct?'" *Lewis*, 944 F.3d at 1296. Without a connection between Plaintiffs' alleged injuries and the Governor's conduct, Plaintiffs lack standing to bring claims against the Governor.

[9] There are several exceptions outlined in the statute for when a person may possess a weapon even in the absence of a GWL. *See* O.C.G.A. § 16-11-126.

[10] Plaintiffs must demonstrate standing, not only for each claim, but "for each form of relief that is sought." *Town of Chester*, 137 S. Ct. at 1650 (internal quotation and citation omitted).

See also Allen v. Wright, 468 U.S. 737, 752-753 (1984) (holding that parents of school children did not have standing to challenge federal tax exemptions to racially discriminatory private schools because the alleged injury was not "fairly traceable to the assertedly unlawful conduct of the IRS."). Regardless of how framed, it is clear that Plaintiffs' complaint is with the probate court's decision to temporarily suspend GWL applications, not any requirement found in O.C.G.A. § 16-11-126.

Because Plaintiffs lack standing to challenge the general weapons license requirements in O.C.G.A. § 16-11-126, and the statutory framework for obtaining a license, their Complaint against Governor Kemp should be dismissed.

B. Plaintiffs' Claims Against Governor Kemp Are Barred by the Eleventh Amendment.

The Eleventh Amendment bars suit against a State's agencies, departments, or officials, absent a waiver by the State or a valid congressional override, when the State is the real party in interest or when any monetary recovery would be paid from State funds. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984). Because claims against public officials in their official capacities are merely another way of pleading an action against the entity of which the officer is an agent, "official capacity" claims

against a state officer are included in the Eleventh Amendment's bar. *Kentucky*, 473 U.S. at 165.

The State Law Claims Are Barred

"A State's constitutional interest in immunity encompasses not merely whether it may be sued, but *where* it may be sued." *Pennhurst*, 465 U.S. at 99 (emphasis added). "Thus, a State does not waive Eleventh Amendment immunity in federal courts merely by waiving sovereign immunity in its own courts." *Welch v. Texas Dep't of Highways & Public Transp.*, 483 U.S. 468, 473-474 (1987). While an exception to the Eleventh Amendment bar exists for suits against state officers in their official capacities seeking prospective equitable relief to end violations of federal law, the exception does not extend to actions for prospective equitable relief to end violations of state law. *Pennhurst*, 465 U.S. at 106; *Doe v. Bush*, 261 F.3d 1037, 1055 (11th Cir. 2001) (explaining that "federal courts do not have the authority to compel state actors to comply with state law.") "It is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment." *Pennhurst*, 465 U.S. at 106. "For that reason, a federal court may not entertain a cause of action against a state for alleged violations of state law, even if that state claim is pendent to a federal claim which the district court could

adjudicate." *DeKalb County Sch. Dist. v. Schrenko*, 109 F.3d 680, 688 (11th Cir. 1997). In other words, 28 U.S.C. § 1367 does not abrogate the Eleventh Amendment. *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533 (2002). Therefore, Plaintiffs' claims, premised on the Georgia Constitution and state law, fail as a matter of law.

In addition, even Plaintiffs' federal claims are premised on alleged violations of state law. Both Plaintiffs' Due Process claim and the Second Amendment claim are premised on Plaintiffs' inability to *currently* obtain a GWL due to the judicial state of emergency. Doc. 1 ¶¶ 21-22 (alleging that probate judges have determined that GWL's are not an essential function); ¶¶ 23-24 (alleging that Defendant Toomer is not processing GWL's); ¶ 43 (alleging that Plaintiff Carter's right to Due Process is violated because she cannot obtain a GWL as required by state law); ¶ 46 (alleging violation of Second Amendment by "effectively preventing Carter from carrying a handgun"). In other words, the gravamen of Plaintiffs' Complaint is an alleged violation of state law. Therefore, these federal claims are also barred by the Eleventh Amendment. *See Doe v. Bush*, 261 F.3d 1037, 1055 (11th Cir. 2001) (explaining that "federal courts do not have the authority to compel state actors to comply with state law."); *S&M Brands, Inc. v. Georgia ex rel. Carr*, 925 F.3d 1198, 1205 (11th Cir. 2010) (First Amendment claim barred where "gravamen of the complaint appears to be that the State has improperly

interpreted and failed to adhere to a state statute"); *DeKalb Cty. Sch. Dist. V. Schrenko*, 109 F.3d 680, 688 (11th Cir. 1997) (holding claims barred where "gravamen of its complaint appears to be that the State has improperly interpreted and failed to adhere to a state statute governing reimbursement for transportation costs."). Similarly, here, the gravamen of Plaintiffs' complaint is that they cannot currently obtain a license, as both required and provided for by state law.

The *Ex Parte Young* Exception

Plaintiffs' federal claims against Governor Kemp are further barred by the Eleventh Amendment because this lawsuit does not fall within the *Ex Parte Young* exception to Eleventh Amendment immunity. 209 U.S. 123 (1908). Generally, suits against state officers for prospective injunctive relief for the violation of federal rights are not barred by the Eleventh Amendment. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 n. 24 (1997). However, "[i]n making an officer of the State a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the State, and thereby attempting to make the State a party." *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1341 (11th Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000) (quoting *Ex parte Young*, 209 U.S. at 157 and declining to apply the exception where Defendants had no authority to enforce the

challenged statutory provision). Like *Summit*, here, there is no connection between the Governor and the decision of a member of the judicial branch to suspend processing weapons licenses.[11] As noted above, Plaintiffs do not challenge the State's general licensure requirements. They do not claim that either O.C.G.A. § 16-11-126 or O.C.G.A. § 16-11-129 is unconstitutional. Rather, they challenge only the statute's enforcement in the context of another government official's action to suspend issuing licenses. However, as discussed in more detail above, Governor Kemp has no authority to compel a member of the judicial branch in the performance of his or her duties. *See* Sec. I.A., *supra*.

II. Plaintiffs' Complaint Fails to State a Claim.

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint is subject to dismissal if it does not "state a claim upon which relief can be granted." When reviewing a motion to dismiss, the Court must take the allegations of the complaint as true and must construe those allegations in the light most favorable to the plaintiff. *Riven v. Private Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008). However, "the tenet that a court must accept as true all of the allegations

[11] *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988) and *GeorgiaCarry.Org, Inc. v. Ga.*, 687 F.3d 1244 (11th Cir. 2012) are not to the contrary. In both cases the challenge was to the state's structure and not its suspension by another branch of government. Here, Plaintiffs do not challenge the statutory structure but instead challenge the probate judge's suspension of new applications for Georgia weapons licenses due to the judicial emergency.

contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also Amer. Dental Assoc. v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (courts are to "eliminate any allegations in the complaint that are merely legal conclusions").

A. Plaintiffs Fail to Sufficiently Allege a Violation of Due Process.

Defendant has already set forth, in his brief in opposition to Plaintiffs' TRO, that Plaintiffs' Complaint fails to state a Due Process claim. Defendant hereby adopts and incorporates in full the Due Process arguments on pages 17 through 22 of his prior brief (Doc. 33).

B. To the Extent Plaintiffs Seek Damages Against Governor Kemp, the Claim Should be Dismissed.

Plaintiffs Complaint purports to bring a claim for damages against Governor Kemp. (Doc. 1, ¶ 11). However, the prayer for relief includes no claim for damages. (*See* Doc. 1, ¶¶ 48-53).[12] To the extent Plaintiffs bring any claim for damages against Governor Kemp, he is entitled to qualified immunity from those damages.

[12] Plaintiffs do seek costs and fees against Defendants in their individual capacities. (Doc. 1, ¶ 53). Plaintiffs cannot recover fees and costs pursuant to 42 U.S.C. § 1988 against Defendants in their individual capacities unless they prevail on one of their federal claims, brought pursuant to 42 U.S.C. § 1983, against Defendants in their individual capacities. *Kentucky*, 473 U.S. at 165 (explaining that "liability on the merits and responsibility for fees go hand in hand . . .").

Qualified immunity protects governmental defendants sued in their individual capacities so long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). This immunity protects from suit all but the plainly incompetent or those who knowingly violate federal law. *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002). The relevant question to be answered is the "objective (albeit fact specific) question," of whether a "reasonable officer" would have believed the defendant's action to be lawful in light of clearly established law and the information possessed by the defendant. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

The public official must first show that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred. *Vinyard*, 311 F.3d at 1346. The burden then shifts to the plaintiff to show that immunity is not appropriate. *Id.* To carry that burden, the plaintiff must show that the constitutional right asserted was clearly established at the time the alleged violation occurred. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The "salient question" is whether the state of the law at the time of the incident gave the defendant "fair and clear warning" that his conduct with respect to the plaintiff was unconstitutional. *Id.* at 746. Liability only attaches if "the contours of the right

[are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *United States v. Lanier*, 520 U.S. 259, 270 (1997).

Here, for the reasons argued above, Plaintiffs cannot show that Governor Kemp has violated any of Plaintiffs' clearly established rights. Therefore, he is entitled to qualified immunity.

CONCLUSION

Because Plaintiffs' Complaint fails to establish standing, is barred by the Eleventh Amendment, and fails to state a claim against Governor Kemp, the Complaint should be dismissed.

Respectfully submitted this 4th day of May 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the forgoing Defendant's Brief in Support of Motion to Dismiss was prepared in 14-point Times New Roman in compliance with Local Rules 5.1(C) and 7.1(D).

CERTIFICATE OF SERVICE

I hereby certify that this filing conforms to the requirements of L.R. 5.1(C). This filing is written in 14 point New Times Roman font.

I hereby certify that on this day, I electronically filed **DEFENDANT GOVERNOR BRIAN KEMP'S BRIEF IN SUPPORT OF MOTION TO DISMISS** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of the attorneys of record.

This 4th day of May, 2020.

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