NO. 11-10387-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GEORGIACARRY.ORG, INC., et al.,

Appellants,

v.

STATE OF GEORGIA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
Case No. 5:10-cv-00302-CAR

BRIEF OF APPELLEES STATE OF GEORGIA AND GOVERNOR DEAL

	SAMUEL S. OLENS Attorney General	551540
	KATHLEEN M. PACIOUS Deputy Attorney General	558555
Please serve:		
Laura L. Lones State Law Department 40 Capitol Square, S.W. Atlanta, Georgia 30334-1300 (404) 463-8850	DEVON ORLAND Senior Assistant Attorney General	554301
	LAURA L. LONES Assistant Attorney General	456778

NO. 11-10387-GG

GeorgiaCarry.org, Inc., et al., v. State of Georgia, et al.,

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11 Circuit Rule 26.1-1, the following have an interest in the outcome of this case:

The Baptist Tabernacle of Thomaston, Georgia, Inc.—*Plaintiff/Appellant*

Nathan Deal, Governor of Georgia[1]—*Defendant/Appellee*

GeorgiaCarry.org., Inc.—*Plaintiff/Appellant*

Kyle Hood, County Manager for Upson County, Georgia—*Defendant/Appellee*

Laura L. Lones, Assistant Attorney General—*Attorney for Defendants/Appellees State of Georgia and Governor Deal*

Truitt A. Mallory—*Attorney for Defendants/Appellees Upson County and Hood*

John R. Monroe—*Attorney for Plaintiffs/Appellants*

Samuel S. Olens, Attorney General for the State of Georgia—*Attorney for Defendants/Appellees State of Georgia and Governor Deal*

Devon Orland, Senior Assistant Attorney General—*Attorney for Defendants/Appellees State of Georgia and Governor Deal*

---

[1] Governor Sonny Perdue, in his official capacity, was named as a defendant below. (*See docket*). On January 10, 2011, Nathan Deal was sworn in as Perdue's successor, and thus, was automatically substituted as a party defendant in this matter. Fed.R.Civ.P. 25(d); Fed.R.App.P. 43(c)(2).

Kathleen M. Pacious, Deputy Attorney General—*Attorney for Defendants/Appellees State of Georgia and Governor Deal*

Hon. C. Ashley Royal—*United States District Judge*

Edward Stone—*Plaintiff/Appellant*

J. Edward Trice, Jr.—*Attorney for Defendants/Appellees Upson County and Hood*

Upson County, Georgia—*Defendant/Appellee*

Rev. Jonathan Wilkins—*Plaintiff/Appellant*

STATEMENT REGARDING ORAL ARGUMENT

Appellees State of Georgia and Governor Deal do not believe that oral argument is necessary to resolve the issues raised in this appeal.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes

Rules

Treatises

TABLE OF RECORD REFERENCES IN THE BRIEF

Items marked * were not cited in Appellants' brief, and thus, are included in the Joint Supplemental Record Excerpts of Appellees.

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Appellees State of Georgia and Governor Deal do not adopt any portion of any brief submitted by any other party.

STATEMENT OF JURISDICTION

Defendants removed this matter to the District Court from the Superior Court of Upson County, Georgia, pursuant to 28 U.S.C. §§ 1441 and 1446. The District Court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 as this is an appeal from a final order of the district court. Plaintiffs filed a timely notice of appeal. Fed.R.App.P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that the challenged Statute does not violate the Free Exercise Clause of the First Amendment because it does not place a substantial burden on religious expression?

2. Whether the district court correctly concluded that the challenged Statute does not violate the Second Amendment because, under intermediate scrutiny, the Statute is substantially related to an important governmental objective?

3. Whether the district court correctly concluded that the State of Georgia cannot be sued because the State of Georgia is not a person within the meaning of 42 U.S.C. § 1983 and is immune under the Eleventh Amendment?

STATEMENT OF THE CASE

(i) Course of Proceedings

Plaintiffs filed this action in the Superior Court of Upson County, Georgia, seeking equitable relief. (R1-2 at 4-13; R5 (amended complaint filed in federal court)). Defendants removed this matter to federal court and moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and (b)(6). (R1; R9; R15). The district court dismissed this action and entered judgment for Defendants. (R32; R33). Plaintiffs filed a timely notice of appeal. (R34).

(ii) Statement of Facts

Plaintiffs are two individuals and two organizations related to the individuals. Plaintiff Wilkins is the minister and CEO of the Plaintiff Baptist Tabernacle of Thomaston, Georgia. (R5, ¶¶ 3, 7, 24). Plaintiff Stone is a board member and the now-former president of Plaintiff GeorgiaCarry.org, a gun rights organization. (*Id.*, ¶¶ 2, 6). They brought this action against four Defendants—the State of Georgia; the Governor of Georgia in his official capacity; Upson County, Georgia;[2] and the Upson County manager—challenging the constitutionality of a State statute, O.C.G.A. § 16-11-127, under the Free Exercise Clause of the First

[2] The Tabernacle is located in Upson County. (R5, ¶ 3).

Amendment and the Second Amendment. (*Id.*, ¶¶ 8-13, 39-50). As discussed more fully below, this Statute prohibits the carriage of weapons to "places of worship" under certain conditions and in certain manners. O.C.G.A. § 16-11-127.

In the operative complaint, Wilkins and Stone, both licensed by the State of Georgia to carry a firearm, asserted that they regularly attended religious services and desired to carry handguns with them to those services for purposes of protection. (R5, ¶¶ 17-18, 23, 28). Wilkins also wished to have a firearm with him when he was at work in the Tabernacle, sometimes alone. (*Id.*, ¶¶ 25-26, 28). The Tabernacle wanted to have members armed at worship services and other activities. (*Id.*, ¶ 29). GeorgiaCarry.org averred that it had members who regularly attended religious meetings who wished to carry handguns with them to those services. (*Id.*, ¶ 21). No Plaintiff alleged that a sincerely held religious belief *required* the taking of a weapon to a place of worship.[3] Plaintiffs collectively claimed that, because of the challenged statute, they feared arrest and prosecution for carrying a firearm to a place of worship. (*Id.*, ¶¶ 18, 21, 28-29).

The district court granted Defendants' motions to dismiss, concluding that the Statute violated neither the First nor the Second Amendment. (R32). In addressing the First Amendment question, the district court noted that no Plaintiff

claimed a religious requirement to take a gun to a place of worship. (*Id.* at 5). Accordingly, because the Statute did not prohibit anyone from attending religious services, any burden on religious expression was "attenuated and tangential." (*Id.* at 6). Because the Statute did not place a substantial burden on religious conduct, it did not violate the First Amendment's Free Exercise Clause.[4] (*Id.* at 8).

The district court also ruled that the Statute did not violate the Second Amendment's right to bear arms. (*Id.* at 10-25). Applying intermediate scrutiny, the district court determined that the Statute was substantially related to the important governmental objective of protecting attendees at religious services "from the fear or threat of intimidation or armed attack." (*Id.* at 19-22).

Finally, the district court determined that Plaintiffs' claims against the State of Georgia were barred by sovereign immunity. (*Id.* at 25-28).

The district court entered judgment in favor of Defendants. (R33).

---

[3] Plaintiffs conceded this point. (R6-2 at 10 ("Plaintiffs do not assert that their religious beliefs require them to carry guns to 'places of worship'")).

[4] The district court also ruled that the Statute did not encroach on the Tabernacle's ability to manage its religious affairs. (R32 at 8-10). Plaintiffs have not challenged this aspect of the district court's ruling on appeal, and thus, have abandoned any arguments in this regard. *Malawney v. Fed. Collection Deposit Group*, 193 F.3d 1342, 1345 (11th Cir. 1999).

(iii) Statement of the Standard of Review

This Court reviews *de novo* a dismissal under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1022-23 (11th Cir. 2001) (*en banc*).

"On the hearing of any appeal . . . in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." ; see also Fed.R.Civ.P. 61 (stating that "[a]t every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights").5 Accordingly, this Court "will not reverse if an error of the district court is harmless . . . ." Goldsmith v. Bagby Elevator Co., Inc., 513 F.3d 1261, 1276 (11th Cir. 2008). An error is presumed harmless unless and until the party asserting error proves that the error prejudiced a substantial right of that party. United States v. Killough, 848 F.2d 1523, 1527 (11th Cir. 1988). The Court is to consider the entire record in determining whether the error was harmless or prejudicial. Id.

This Court ordinarily does not consider issues raised for the first time on appeal. *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1544 (11th Cir. 1994). Issues not

[5]Although, strictly speaking, Rule 61 does not apply to this Court, "it is well settled that the appellate courts should act in accordance with the salutary policy

raised in the appellant's initial brief are deemed abandoned. *Malowney v. Fed. Collection Deposit Group*, 193 F.3d 1342, 1345 (11th Cir. 1999).

If a proper ground exists, the judgment below should be affirmed, even if for a reason other than that upon which the lower court relied. *Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1433 n.9 (11th Cir. 1998).

---

embodied in Rule 61." *McDonough Power Equipment, Inc., v. Greenwood*, 464 U.S. 548, 554 (1984).

SUMMARY OF THE ARGUMENT

The challenged Statute is not the "ban" Plaintiffs argue it to be. It prohibits licensed weapon carriers from engaging in only two actions at places of worship: (1) they cannot carry a firearm into a place of worship that does not consent to that carriage; and (2) in a consenting place of worship, they cannot carry a firearm in an unsecured manner.

The Statute does not burden religious belief or expression in any meaningful way, and thus, does not violate the Free Exercise Clause of the First Amendment. No Plaintiff alleges that a sincerely held religious belief requires the taking of a weapon to a place of worship and the Statute does not prohibit the carriage of a secured weapon at a place of worship that consents to such carriage.

The Statute does not violate the Second Amendment. Viewed under intermediate scrutiny, the Statute is substantially related to multiple important governmental objectives. Moreover, given that license holders may carry secured weapons to consenting places of worship, the burden placed on weapon bearing is so insubstantial that the Statute passes constitutional muster under any level of scrutiny.

Finally, even if Plaintiffs have presented one or more viable causes of action, they cannot pursue them against the State of Georgia.

ARGUMENT AND CITATION OF AUTHORITY

A. The Statute under review and the applicable canons of statutory construction

1. *Plaintiffs fail to identify, much less discuss, the nature of their statutory challenge*

In the operative complaint, Plaintiffs challenged the Statute both facially and as applied. (R5, ¶¶ 40, 43, 46, 49). On appeal, they fail to indicate the nature of their challenge. (*See generally* Blue Brief). The State Defendants must presume that they intend both, and so, set forth the requirements for both types of challenges.

Facial challenges are disfavored in the law. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008). A facial challenge can succeed only when a plaintiff shows that "no set of circumstances exists under which the [statute] would be valid." *Id.* at 1190 (*quoting United States v. Salerno*, 481 U.S. 739, 745 (1987)). To be facially invalid, the law must be unconstitutional in *all* of its applications. *Id.*; *Village of Hoffman Estates v. The Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.5 (1982) (a successful facial challenge means that the law is incapable of any valid application).

A statute "should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts." *Erznoznik v. City of*

Jacksonville, 422 U.S. 205, 216 (1975). A court may choose to adopt a narrowing construction if that construction is "reasonable" and "readily apparent." *Stenberg v. Carhart*, 530 U.S. 914, 944 (2000).

"An as-applied challenge, by contrast, addresses whether 'a statute is constitutional on the facts of a particular case or to a particular party.'" *Harris v. Mexican Speciality Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009) *quoting* Black's Law Dictionary. "The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, but not to render it utterly inoperative." *Ada v. Guam Society of Obstetricians and Gynecologists*, 506 U.S. 1011 (1992) (Scalia, J., dissenting).

2. *The requirements for injunctive relief*

A plaintiff seeking permanent injunctive relief must prove four elements: (1) an actual, irreparable injury; (2) that the remedies available at law will not adequately compensate for the injury; (3) that, considering the balance of hardships between the parties, an equitable remedy is warranted; and (4) the public interest will not be disserved by the injunction. *Angel Flight of Ga., Inc., v. Angel Flight America, Inc.*, 522 F.3d 1200, 1208 (11th Cir. 2008). The party seeking the injunction must clearly carry its burden of persuasion as to each element. *Klay v.*

United Healthgroup, Inc., 376 F.3d 1092, 1097 (11th Cir. 2004); *Brown v. The Fla. Bar.*, 2010 WL 109381, 7 (M.D. Fla. 2010).

The standards for granting injunctive relief are high. Quoting Supreme Court precedent, the Former Fifth Circuit noted that

> [t]here is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, that the issuing of an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction.

Congress of Racial Equality v. Douglas, 318 F.2d 95, 98 n. 2 (5th Cir. 1963). "An injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal and that the defendant, if not enjoined, will engage in such conduct." *United Trans. Union v. State Bar of Mich.*, 401 U.S. 576, 584 (1971). "Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." *Eccles v. Peoples Bank of Lakewood Village, Ca.*, 333 U.S. 426, 431 (1948).

The Eleventh Circuit has instructed its courts to be even more tentative in issuing injunctions when the party to be enjoined is a state government, stating

> [e]quitable remedies are powerful, and with power comes responsibility for its careful exercise. These remedies can affect nonparties to the litigation in which they are sought; and when, as in this case, they are sought to be applied to officials of one sovereign by the courts of another, they can impair comity, the mutual respect of sovereigns—a legitimate interest even of such constrained sovereigns as the states and the federal government . . . [T]here is not an absolute right to an injunction in a case in which it would impair or affront the sovereign powers or dignity of a state . . . .

McKusick v. City of Melbourne, Fla., 96 F.3d 478, 487-88 (11th Cir. 1996).

Plaintiffs fail to carry their burden of showing their entitlement to equitable relief.

3. *The legal framework for statutory challenges*

"The starting point for all statutory interpretation is the language of the statute itself." *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999). The court is to "read the statute to give full effect to each of its provisions." *Id.; see also Samantar v. Yousuf*, 130 S.Ct. 2278, 2289 (2010) ("we read statutes as a whole"). The court does not look at terms or phrases in isolation, but instead "look[s] to the entire statutory context." *DBB, Inc.*, 180 F.3d at 1281; *see also Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *Woodard*

v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977) (when assessing the constitutionality of a statute, it "must be read as a whole.").

Federal courts should be slow to declare a state statute unconstitutional. *Cotton States Mutual Ins. Co. v. Anderson*, 749 F.2d 663, 667 (11th Cir. 1984). When ruling on the constitutionality of a state statute, federal courts may only consider the plain meaning of the statute and constructions given by state courts. *Id.* The Supreme Court has repeatedly instructed that federal courts are required to construe state statutes in a manner to "avoid constitutional difficulties." *Frisby v. Schultz*, 487 U.S. 474, 483 (1988); *see also Hooper v. Calif.*, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality").

In Georgia, the cardinal rule for the construction of statutes is to ascertain the intent of the General Assembly and the purpose in enacting the law. O.C.G.A. § 1-3-1. Legislative intent must be determined from a consideration of the statute as a whole. *Board of Trustees v. Christy*, 246 Ga. 553, 554 (1980), *overruled on other grounds Mayor & Alderman of Savannah v. Stevens*, 278 Ga. 166, 167-68 (2004). When construing a state statute, no part should be "read out" as "mere surplusage," unless there is a clear reason for doing so. *Porter v. Food Giant, Inc.*, 198 Ga. App. 736, 738 (1991). All words are to be assigned their ordinary

meaning. O.C.G.A. § 1-3-1; *Risser v. City of Thomasville*, 248 Ga. 866, 866 (1982). An act of the General Assembly is presumed to be constitutional. O.C.G.A. § 1-3-1; *State v. David*, 246 Ga. 761, 761 (1980).

4. *The Statute under review*

The Statute Plaintiffs challenge reads, in pertinent part:

> (b) A person shall be guilty of carrying a weapon or long gun[6] in an unauthorized location and punished as for a misdemeanor when he or she carries a weapon or long gun while:
> (1) In a government building;
> (2) In a courthouse;
> (3) In a jail or prison;
> (4) In a place of worship;
> (5) In a state mental health facility as defined in Code Section 37-1-1 which admits individuals on an involuntary basis for treatment of mental illness, developmental disability, or addictive disease; provided, however, that carrying a weapon or long gun in such location in a manner in compliance with paragraph (3) of subsection (d) of this Code section shall not constitute a violation of this subsection;
> (6) In a bar, unless the owner of the bar permits the carrying of weapons or long guns by license holders;
> (7) On the premises of a nuclear power facility, except as provided in Code Section 16-11-127.2, and the punishment provisions of Code Section 16-11-127.2 shall supersede the punishment provisions of this Code section; or
> (8) Within 150 feet of any polling place, except as provided in subsection (i) of Code Section 21-2-413.

[6] "Weapon" and "long gun" are defined by O.C.G.A. § 16-11-125.1(4) and (5).

. . .

> (d) *Subsection (b) of this Code section shall not apply*: . . . . (2) [t]o a license holder[7] who approaches security or management personnel upon arrival at a location described in subsection (b) of this Code section and notifies such security or management personnel of the presence of the weapon or long gun and explicitly follows the security or management personnel's direction for removing, securing, storing, or temporarily surrendering such weapon or long gun . . . .

O.C.G.A. § 16-11-127 (emphasis added).

Although Plaintiffs, throughout their brief, generally refer to the Statute as the "Ban" (*see generally* Blue Brief), it has a much more limited operation than they acknowledge. Under subsection (d)(2), the "security or management personnel" of the place of worship (or other listed place) to which a person with a carry license wishes to take a weapon are vested with a great deal of discretion over whether to allow a weapon on the property.

There are some limits to the discretion. First, the person possessing the weapon must be a "license holder." *Id.* Both individual Plaintiffs, however, claim to hold the appropriate license. (R5, ¶¶ 17, 23). Second, the license holder must notify the statutory decisionmaker of the presence of the weapon. O.C.G.A. § 16-11-127(d)(2). Third, the decisionmaker can choose to exclude the weapon entirely,

[7] "License holder" and "license" are defined at O.C.G.A. § 16-11-125.1(3) and (6).

at least insofar as requiring the license holder to place the weapon in a vehicle in the location's parking facility or surrender or store the weapon while at the location. O.C.G.A. § 16-11-127(d)(2) (allowing decisionmaker to direct license holder to "remov[e]," "stor[e]," or "temporarily surrender[]" the weapon) and (d)(3) (appropriately stored weapon in "parking facility" not covered by subsection (b)).

But, fourth, *if the decisionmaker permits*, the license holder may continue to carry the weapon, subject only to the decisionmaker's instructions as to "securing" the weapon. O.C.G.A. § 16-11-127(d)(2). The statute does not define "securing," and thus, permits the decisionmakers to exercise discretion in determining their own security requirements. Certainly, subsection (d)(2) would not allow a weapon in a place of worship to simply be left lying around where anyone (including a small child) might have ready access. But subsection (d)(2) permits the decisionmaker wide latitude in choosing security measures. In other words, if the decisionmaker permits, a person licensed to carry a firearm may carry that weapon in a place of worship so long as it is carried in a manner that reasonably falls within the meaning of the word "secured."

Viewed as a whole, the Statute prohibits license holders from engaging in only two actions in the protected locations, including places of worship: (1) they

cannot carry a firearm into a location where the decisionmaker does not consent to that carriage; and (2) in a consenting location, they cannot carry a firearm in an unsecured manner.

B. The Statute does not violate the First Amendment's Free Exercise Clause

The Constitution forbids laws "prohibiting the free exercise" of religion. U.S. Const., amend. I. "Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 713 (1981). "Purely secular views do not suffice." *Frazee v. Ill. Dep't of Employment Sec.*, 489 U.S. 829, 833 (1989). "To plead a valid free exercise claim, [a plaintiff] must allege that the government has impermissibly burdened one of his sincerely held religious beliefs." *Watts v. Fla. Internat'l Univ.*, 495 F.3d 1289, 1294 (2007) (internal quotations omitted). It is not enough that the plaintiff asserts that his religion permits him to take the action in question. Instead, a free exercise plaintiff "must plead that he believes his religion *compels* him to take the actions" allegedly being burdened. *Id.*, at 1297 (emphasis added); *see also Frazee*, 489 U.S. at 833 ("Our judgments in those cases rested on the fact that each of the claimants had a sincere belief that religion *required* him or her to refrain from the work in question") (emphasis added).

"Under the Free Exercise Clause, [this Court] appl[ies] strict scrutiny to legislation that imposes a substantial burden on the observation of a religious belief or practice." *Church of Scientology Flag Serv. Org., Inc., v. City of Clearwater*, 2 F.3d 1514, 1549 (11th Cir. 1993). No substantial burden exists if the law does not have "a tendency to coerce individuals to acting contrary to their religious beliefs." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988). On the other hand, religious exercise is substantially burdened if the law "completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion." *Midrash Sephardi, Inc., v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004).[8] Accordingly, this Court has held that:

> a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.

Id. But this discussion of the law merely begs the question of what religious belief or practice has been burdened here.

---

[8] *Midrash Sephardi* is a RLUIPA decision, but it relies heavily on this Court and the Supreme Court's Free Exercise jurisprudence.

Plaintiffs allege in conclusory fashion that the Statute "interferes with the free exercise of religion by Plaintiffs . . . ." (R5, ¶¶ 39, 42). The facts averred in the complaint, however, do not support this claim. No Plaintiff alleges that a sincerely held religious belief *requires* the taking of a weapon to a place of worship.[9] There is no suggestion that weapons are required by any Plaintiff as part of any religious ritual. Instead, Plaintiffs assert an apparently sincere—but secular—desire to carry firearms for protection. (*Id.*, ¶¶ 18, 28-29). As Plaintiffs identify no religious belief that is burdened, they fail to state a Free Exercise claim.

This is especially so in light of subsection (d)(2) of the Statute, which allows it to surmount potential tensions between different constitutional obligations. Churches and other religious institutions that are comfortable with the possession of weapons may permit their presence in their places of worship with only a few public-safety related limitations on the carrying of those weapons. On the other hand, religious bodies with sincere religious objections to weaponry may insist that weapons be kept outside their places of worship. More generally, subsection (d)(2) gives religious organizations, in their capacity as private property owners,[10] the right to determine for themselves whether weapons may be permitted on their

[9] Indeed, Plaintiffs specifically disavowed this in their injunction motion. (R. 6-2 at 10).

property. *See Fla. Retail Fed., Inc., v. Att'y Gen. of Fla.*, 576 F.Supp.2d 1281, 1295 (N.D.Fla. 2008) ("there is no constitutional right to bear arms on private property against the owner's wishes").

The Statute grants religious bodies the authority to manage their own internal affairs, including security, by deciding for themselves whether to allow the carriage of weapons at all and, if so, how and by whom they may be carried. O.C.G.A. § 16-11-127(d)(2). Plaintiffs therefore may carry their firearms to any church that will allow such carriage so long as they follow church management's instructions for securing the weapon. Of course, Plaintiffs cannot impose these wishes on non-consenting churches, but this appears to be a restriction that is supported by at least some of the Plaintiffs[11] and that has never been explicitly rejected by any Plaintiff. Far from being an imposition on the free exercise rights of individuals or of congregations, the Statute merely recognizes that different religious bodies have different viewpoints about weaponry and allows each body to

---

[10] While there are no doubt exceptions, most "places of worship" are likely to be situated on private property.

[11] In a Declaration, Rev. Wilkins stated that "[t]he Tabernacle would like to allow *certain of its members* with GWLs to carry firearms on the Tabernacle's property . . . ." (R20-5, ¶ 14) (emphasis added). This indicates that the Tabernacle desires to pick and choose which persons may and which persons may not carry firearms to church. Such, of course, is exactly what subsection (d)(2) permits.

follow its own conscience. No reasonable reading of the Statute can construe this as a Free Exercise violation.

C. The Statute does not violate the Second Amendment

The Second Amendment confers on an individual the right to keep and bear arms in the home for the purpose of self-defense. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2799, 2822 (2008); *see also McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020, 3050 (2010) ("In *Heller*, we held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense"). The "Second Amendment right recognized in *Heller*" is applicable against the States through the Fourteenth Amendment. *McDonald*, 130 S.Ct. at 3050.

The Supreme Court has indicated, however, that "the right [is] not unlimited." *Heller*, 128 S.Ct. at 2799. The Court was clear that it "[did] not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation . . . ." *Id.*, at 2799 (emphasis in original); *see also id.* at 2816 ("the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"). Accordingly, the Court said that

> "nothing 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."

Id., at 2816-17 (emphasis added); *McDonald*, 130 S.Ct. at 3047 (*quoting id.* and stating that "incorporation does not imperil every law regulating firearms"). The Supreme Court further stated that "[w]e identify these *presumptively lawful* regulatory measures only as examples; our list does not purport to be exhaustive."[12] *Heller*, 128 S.Ct. at 2817 n.26 (emphasis added). The Constitution allows state and local governments to use "a variety of tools" to combat violence, including measures that regulate weapons. *Id.*, at 2822; *McDonald*, 130 S.Ct. at 3046 (*quoting* approvingly from several States' (including Georgia) amicus brief that "[s]tate and local experimentation with reasonable firearms regulations will continue under the Second Amendment"); *United States v. Masciandaro*, 648

---

[12] In considering what the Supreme Court meant in referring to "sensitive places," it is worth noting that, in *Heller*, the Court affirmed a ruling from the District of Columbia Circuit stating that

> the government is [not] absolutely barred from regulating the use and ownership of pistols. . . . Indeed, the right to keep and bear arms—which we have explained pre-existed, and therefore was preserved by, the Second Amendment—was subject to restrictions at common law. We take these to be the sort of reasonable regulations contemplated by the drafters of the Second Amendment. For instance, it is presumably reasonable "to prohibit the carrying of weapons when under the influence of intoxicating drink, or *to a church*, polling place, or public assembly, or in a manner calculated to inspire terror."

Parker v. District of Columbia, 478 F.3d 370, 399 (D.C. Cir. 2007), *quoting State v. Kerner*, 181 N.C. 574, 107 S.E. 222 (1921) (emphasis added).

F.Supp.2d 779, 788 (E.D.Va. 2009) ("although *Heller* does not *preclude* Second Amendment challenges to laws regulating firearm possession outside the home, *Heller*'s *dicta* makes pellucidly clear that the Supreme Court's holding should not be read by lower courts as an invitation to invalidate the existing universe of public weapons regulations") (emphasis in original).

1. *The Statute should be reviewed under intermediate scrutiny*

In *Heller*, the Supreme Court indicated that firearms prohibitions should be scrutinized at a level higher than rational basis analysis. 128 S.Ct. at 2817 n. 27; *see also United States v. Jones*, 673 F.Supp.2d 1347, 1351 (N.D.Ga. 2009) ("it is clear that a higher level of scrutiny than rational basis is to be applied"); *Masciandaro*, 648 F.Supp.2d at 787 ("it is reasonable to conclude from *Heller* that some elevated level of scrutiny is required when assessing the Second Amendment constitutionality of statutes and regulations"). But, although the Supreme Court rejected "a judge-empowering 'interest-balancing inquiry,'" it otherwise declined to pronounce the appropriate level of scrutiny. *Heller*, 128 S.Ct. at 2821.

It is clear, though, that strict scrutiny is not required for the regulations set forth in the Statute. Under strict scrutiny, a challenged statute is presumed to be invalid and that presumption must be overcome. *See*, *e.g.*, *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993); *Beaulieu v. City of Alabaster*, 338 F.Supp.2d 1268, 1273

(N.D.Ala. 2004). The Supreme Court, however, has announced that restrictions on the possession of firearms in "sensitive places" are "presumptively lawful," *Heller*, 128 S.Ct. at 2817 n.26, and thus, has indicated that strict scrutiny is not appropriate for this class of gun regulations.[13]

Not all courts that have recently addressed Second Amendment issues have stated their level of scrutiny and those that have so stated have not all agreed. This Court does not appear to have had an appropriate occasion to speak on this issue. Nevertheless, applying an analysis similar to that set forth in the previous paragraph, an emerging consensus of federal and state courts has, post-*Heller*, addressed the right to bear arms outside the home under the intermediate scrutiny

---

[13] *McDonald* does refer to the right to bear arms as "fundamental," 130 S.Ct. at 3042, but the Court was referring to the right at issue in that case, the right to possess a handgun in the home, *id.* at 3050 ("the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense"). The Statute covers weapon possession outside the home, and thus, outside of this core area of constitutional protection. *See United States v. Masciandaro*, ___ F.3d ___, 2011 WL 1053618, 11 (noting that "the core *Heller* right applies" in the home) and 12 (stating that "as we move outside the home, firearm rights have always been more limited, because public safety interests often outweigh individual interests in self-defense") (4th Cir. 2011); *Peterson v. LaCabe*, 2011 WL 843909, 5 (D. Col. 2011) (Second Amendment right "is entitled to less protection outside the home"). Moreover, the "fundamental" label does not automatically carry with it the requirement of strict scrutiny whenever that constitutional provision is invoked. *See*, *e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980) (applying intermediate scrutiny to free speech claim); *United States v. Chester*, 628 F.3d 673, 682 (4th Cir. 2010) ("We do not apply strict

standard. *See United States v. Masciandaro*, ___ F.3d ___, 2011 WL 1053618, 12 (4th Cir. 2011) (applying intermediate scrutiny to challenge to citation for carrying loaded gun in a vehicle in a national park); *United States v. Reese*, 627 F.3d 792, 802 (10th Cir. 2010) (prohibition on possession of firearm by person subject to domestic protection order "is subject to intermediate scrutiny"); *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (*en banc*) (deciding challenge to prohibition on firearm possession by person convicted of misdemeanor of domestic violence under intermediate scrutiny); *United States v. Marzzarella*, 614 F.3d 85, 97 (3rd Cir. 2010) (ban on possession of handgun with obliterated serial number evaluated under intermediate scrutiny); *Hall v. Garcia*, 2011 WL 995933, 3 (N.D. Cal. 2011) (stating that "most regulations, especially those outside the core Second Amendment right, may not be subject to strict scrutiny" and applying intermediate scrutiny to Gun-Free School Zone Act); *Peterson v. LaCabe*, 2011 WL 8439009, 8 (D. Col. 2011) (challenge to concealed-carry permit statute evaluated under intermediate scrutiny); *United States v. Lundsford*, 2011 WL 145195, 6 (S.D. W.V. 2011) ("intermediate scrutiny is appropriate" for challenge to felon-in-possession statute); *Peruta v. County of San Diego*, ___ F.Supp.2d ___, 2010 WL 5137137, 8 (S.D. Cal. 2010) (stating that "[n]either party has cited, and the Court is not aware

---

scrutiny whenever a law impinges upon a right specifically enumerated in the Bill

of, a case in which a court has employed strict scrutiny to regulations that do not touch on the 'core' Second Amendment right: possession in the home" and then applying intermediate scrutiny to concealed-carry license denial); *United States v. Oppedisano*, 2010 WL 4961663, 2 (E.D. N.Y. 2010) ("strict scrutiny is incompatible with *Heller*'s dicta concerning presumptively constitutional gun prohibitions"); *Jones*, 673 F.Supp.2d at 1355 (applying intermediate scrutiny to combined equal protection/Second Amendment analysis of federal felon-in-possession ban); *United States v. Bledsoe*, 2008 WL 3538717, 4 (W.D.Tex. 2008) (applying intermediate scrutiny to challenge to false-statement-during-firearm-purchase indictment); *People v. Ross*, ___ N.E.2d ___, 2011 WL 904294, 9 (Ill.App. 2011) (applying intermediate scrutiny to armed habitual criminal statute); *People v. Schartz*, 2010 WL 4137453, 6 (Ct.App. Mich. 2010) (applying intermediate scrutiny to felon-in possession statute). Even some home-bound gun possession has been considered under intermediate, rather than strict, scrutiny. *See United States v. Chester*, 628 F.3d 673, 683 (4th Cir. 2010) ("intermediate scrutiny is more appropriate" for challenge to home possession of firearm by person convicted of misdemeanor of domestic violence).

---

of Rights").

Under intermediate scrutiny, a regulation is permissible if it is "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *see also Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1244 (11th Cir. 2003). As shown in more detail below, the Statute easily passes this test.

2. *The Statute is a valid restriction on the right to bear arms*

Under intermediate scrutiny, the Statute is valid. The Statute promotes a number of State interests, each of which is important. First, the State has a substantial interest in deterring and punishing violent crime, including crimes committed with firearms. *Heller*, 128 S.Ct. at 2822 ("gun violence is a serious problem"); *United States v. Salerno*, 481 U.S. 739, 750 (1987) ("the government's interest in preventing crime is compelling"); *Skoien*, 614 F.3d at 642 ("preventing armed mayhem[] is an important governmental objective"); *United States v. Bissell*, 866 F.2d 1343, 1353 (11th Cir. 1989) (noting "government's compelling regulatory interest in preventing crime"). Second, the State has an especially strong interest in deterring and punishing crime directed at "sensitive places"—such as the places of worship, governmental buildings, courthouses, and polling locations specifically protected by the Statute—as each is a location where

fundamental constitutional rights are exercised.[14] Third and most specifically, the State has a substantial interest in protecting the free exercise of religion.[15] *See Benning v. State of Georgia*, 391 F.3d 1299, 1308 (11th Cir. 2004) (protection of free exercise of religion is substantial governmental interest).

The Statute directly advances, and thus is substantially related to, each of the asserted interests. By limiting the locations to which one may lawfully bring a

---

[14] At the courthouse, the people obtain access to the courts and have their grievances heard. *See Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (applying Title II of the ADA to "the class of cases implicating the fundamental right of access to the courts" under the Constitution). Governmental buildings, too, provide the people with a location where they can petition for the redress of grievances. *See Amnesty Internat'l, USA, v. Battle*, 559 F.3d 1170, 1186 (11th Cir. 2009) ("There can be absolutely no doubt that the First Amendment rights to [among other things] petition to government for redress of grievances are among our most fundamental, deeply cherished and clearly established constitutional freedoms"). Places of worship are where many people go to engage in the free exercise of religion. *See Johnson v. Robinson*, 415 U.S. 361, 375 n.14 (1974) (noting that the free exercise of religion is a fundamental right under the Constitution). Polling locations are where citizens engage in the unenumerated, but fundamental, right of voting. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("voting is of the most fundamental significance under our constitutional structure").

[15] The district court concluded that "Defendants' second objective, protecting individuals at sensitive locations, is only a generalization of their more specific third objective" (R32 at 22 n.15), which is a fair point. Defendants reassert both rationales here to allow the Court to consider both the specific objective—protecting religious expression—that the district court correctly found justified the Statute (*id.* at 22), and also the larger scope of the Statute's overall protective scheme which covers several locations where fundamental constitutional rights are exercised. *See DBB, Inc.*, 180 F.3d at 1281 (courts should "look to the entire statutory context").

weapon, the Statute deters gun violence by providing for punishment for those who do bring weapons to those locations. *See* 22 C.J.S. Criminal Law § 10 ("The purpose of the criminal law is the protection of the public, accomplished by deterring the commission of crimes"). The district court appeared to reject this rationale, stating that 'Defendants have not demonstrated that places of worship are either targets or locations of frequent criminal activity . . . ." (R32 at 21). This reasoning, however, ignores the fact that a version of this Statute has been on the books in Georgia since 1870. *See Hill v. State*, 53 Ga. 472, 2 (1874) (referring to "[t]he act of October, 1870" forbidding carriage of weapons in "any place of public worship"). Accordingly, the lack of a history of armed criminal activity at places of worship is an indicator of the efficacy of the Statute in preventing just such criminal activity. *See, e.g., Bell v. Wolfish*, 441 U.S. 50, 559 (1979).[16]

By deterring potential violence at "sensitive places" where constitutional liberties are exercised, the Statute assists the People to go to those locations without fear of violence or intimidation. Most specifically, by deterring violent

[16] In an action challenging strip searches of incoming jail detainees, the Supreme Court responded to the inmates' argument that there was no history of detainees smuggling in contraband by noting: "[t]hat there has been only one instance where an MCC inmate was discovered attempting to smuggle contraband into the institution on his person may be more a testimonent to the effectiveness of this search technique as a deterrent than to any lack of interest on the part of the inmates to secrete and import such items when the opportunity arises."

crime that might be directed at religious institutions or their members, the Statute not only facilitates attendance, but also allows worshippers to focus on spiritual activities, many of which are inconsistent with protective vigilance.[17]

Because the Statute is substantially related to these important governmental objectives, the analysis could end here. As discussed above, however, these Defendants note that the actual burden that the Statute places on any Second Amendment right to bear arms is not significant and not really argued by Plaintiffs. First, Plaintiffs—and others licensed to carry firearms—can carry their weapons to any place of worship that consents so long as they carry them in a manner that can be deemed "secured."[18] O.C.G.A. § 16-11-127(d)(2). Plaintiffs never directly argue that they have a constitutional right to carry an unsecured weapon nor can they make any meaningful argument that they have a right to carry a weapon in a potentially unsafe manner. Second, Plaintiffs do not argue that they have a constitutional right to carry a firearm into a place of worship that forbids such carriage. And such a right should not be recognized as it would interfere with both the private property rights of religious bodies that wish to exclude weapons and the

[17] For example, prayer and meditation—activities that often occur at places of worship—frequently involve bowed heads and closed eyes, and thus, are not compatible with watchfulness against attack.

free exercise rights of religious bodies that have sincere religious objections to weapons. Given the lightness of the firearm-carriage burden placed on Plaintiffs and other gun owners, the Statute is clearly permissible under the Second Amendment under any level of scrutiny.

D. The State of Georgia cannot be sued in this action

1. *The State of Georgia is not a "person" within the meaning of 42 U.S.C. § 1983*

The State of Georgia cannot be a party-defendant in this action because it is not a "person" amenable to suit under 42 U.S.C. § 1983. The specific language of § 1983 allows plaintiffs to sue only "person[s]" who violate their civil rights. 42 U.S.C. § 1983. In interpreting this statute, federal courts have clearly ruled that a State is not a "person" within the meaning of § 1983. *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71 (1989). The statutory language of 42 U.S.C. § 1983 "creates no remedy against a State." *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 69 (1997). The State, therefore, cannot be a defendant in a § 1983 action.

Below, Plaintiffs tried to avoid this problem of statutory construction by attempting to bring their claims both under § 1983 and as a so-called "direct

---

[18] This would seem to be especially so with regard to Plaintiff Wilkins who, as CEO of the Tabernacle, likely would play a significant role in deciding whether he could bring a firearm to the Tabernacle. (R5, ¶ 7).

action." (R5). Such direct actions, however, are not permissible against the State or state officials.

The Supreme Court has permitted direct constitutional actions against *federal* personnel because there is no federal statute conferring the right to bring constitutional actions concerning the federal government. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). That Court has also held, however, that such a direct action is not permitted "when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective." *Carlson v. Green*, 446 U.S. 14, 18 (1980) (emphasis in original). Accordingly, this Court has ruled that, because § 1983 provides an equally effective remedial scheme for violations of constitutional rights at the state level, a *Bivens*-type direct action is not appropriate against state officials. *Williams v. Bennett*, 689 F.2d 1370, 1390 (11th Cir. 1982).

Plaintiffs' only meaningful argument in support of the direct action was that it was necessary for them to sue the State directly because of § 1983's requirement that the defendant sued be a "person." (R12 at 15). *Bivens*, however, requires only that a plaintiff have an adequate remedy, not that he must have it against every possible defendant.

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

2. *Plaintiffs' action is barred by the Eleventh Amendment*

The Eleventh Amendment bars suit against a State or one of its agencies or departments absent a waiver by the State or a valid congressional override. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). "[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984). The Supreme Court has repeatedly held that "§ 1983 does not override a State's Eleventh Amendment immunity." *Will*, 491 U.S. at 63; *Quern v. Jordan*, 440 U.S. 332, 342; *Graham*, 473 U.S. at 169 n. 17.

The State has not consented to being sued under 42 U.S.C. § 1983. To the contrary, the State has specifically preserved its immunity in the State constitution; the Georgia Constitution provides that "[n]o waiver of sovereign immunity . . . shall be construed as a waiver of any immunity provided to the state or its

departments, agencies, officers, or employees by the United States Constitution." Ga. Const. Art. I, Sec. II, Par. IX(f). While an exception to Eleventh Amendment immunity exists under *Ex Parte Young*, 209 U.S. 123 (1908), it is limited to suits against individuals sued in their official capacity for prospective injunctive relief. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997).

By removing this action to federal court, the State of Georgia waived its immunity to being sued *in federal court*. *Lapides v. Board of Regents of the University System of Georgia*, 535 U.S. 613, 618 (2002). The State of Georgia retained, however, any immunity defense it could have asserted in state court. *Massalon v. Bd. of Regents of the Univ. Syst. of Ga.*, No. 02-14657, man.op. at 34 (11th Cir. 2003).[19] One of the immunity defenses the State of Georgia could and would have raised in state court is sovereign immunity.

Plaintiffs contend that immunity is not applicable here because they seek only equitable relief. (Blue Brief at 25-27). While it is true that the Georgia Supreme Court has recognized a limited exception to immunity under such circumstances, *In the Interest of A.V.B.*, 267 Ga. 728, 728 (1997), that same Court has explicitly refused to address "whether sovereign immunity would bar a suit based on the alleged violation of a constitutional right." *Internat'l Business Mach.*

Corp. v. Evans, 265 Ga. 215, 217 n.3 (1995). It is not necessary for this Court to push state law into a place where the state courts have so far refused to go, especially in light of a state constitutional provision that would seem to prohibit recognition of the asserted waiver. Ga. Const., Art. I, Sec. II, Para. IX(f). Accordingly, the State of Georgia is immune from all claims in this action.

---

[19] This unpublished opinion was submitted to the district court and can be found at R22-2.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendants/Appellees the State of Georgia and Governor Deal respectfully submit that this Court should affirm the judgment below.

Respectfully submitted,

SAMUEL S. OLENS 551540
Attorney General

Kathleen M. Pacious 558555
Deputy Attorney General

Devon Orland 554301
Senior Assistant Attorney General

/s/Laura Lones
Laura L. Lones 456778
Assistant Attorney General

Please serve:
Laura L. Lones
40 Capitol Square, S. W.
Atlanta, Georgia 30334-1300
(404) 463-8850

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS,
AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed.R.App.P.32(a)(7)(B) because this brief contains 6,789 words, excluding the parts of the brief exempted by Fed.R.App.P.32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 and is typed in 14 point Times New Roman font.

/s/ Laura Lones
Laura L. Lones
Assistant Attorney General
Attorney for Appellees
State of Georgia and Governor Deal

Dated: April 22, 2011

CERTIFICATE OF SERVICE

I do hereby certify that I have this day filed with the court, electronically filed with the Court, and served the within and foregoing pleading, prior to filing the same, by depositing a copy thereof in the United States Mail, properly addressed upon:

John R. Monroe
9640 Coleman Road
Roswell, Georgia 30075

J. Edward Trice, Jr.
Mallory & Trice, LLP
P.O. Drawer 832
Thomaston, Georgia 30286

This 22nd day of April, 2011.

/s/ Laura Lones
Laura L. Lones
Assistant Attorney General
Attorney for Appellees
State of Georgia and Governor Deal