IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

GEORGIACARRY.ORG, INC., et al.,	
Plaintiffs,	
v.	CIVIL ACTION NO. 5:10-cv-00302-CAR
THE STATE OF GEORGIA, et al.,	
Defendants.	

RESPONSE OF DEFENDANTS STATE OF GEORGIA AND GOVERNOR PERDUE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Come now the State of Georgia and Governor Sonny Perdue in his official capacity, Defendants in the above-styled action, by and through counsel, Thurbert E. Baker, Attorney General for the State of Georgia, without waiving any defenses as to jurisdiction or service of process, and submit this brief in opposition to Plaintiffs' motion for preliminary injunction, showing the Court as follows:

A. Plaintiffs cannot obtain injunctive relief against the State of Georgia

As discussed more fully in Defendants' motion to dismiss[1] (Doc. 9-2 at 3-4), 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). The State of Georgia has specifically preserved its sovereign immunity in the state 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). The State of Georgia is immune and cannot be enjoined.

B. Plaintiffs are not entitled to a preliminary injunction

A preliminary injunction is appropriate where the moving party demonstrates that: (a) there is a substantial likelihood of success on the merits; (b) the preliminary injunction is necessary to prevent irreparable injury; (c) the threatened injury outweighs the harm that the preliminary injunction would cause to the non-movant; and (d) the preliminary injunction would not be adverse to the public interest. *Parker v. State Bd. of Pardons & Paroles*, 275 F.3d 1032, 1034-35

[1] Defendants adopt and incorporate the arguments presented in support of their motion to dismiss.

(11th Cir. 2001). Such injunctive relief "is an extraordinary and drastic remedy which should not be granted unless the movant clearly carries the burden of persuasion." *Canal Authority of Florida v. Callaway*, 489 F.2d 567, 573 (11th Cir. 1974). The burden of persuasion as to all four requirements is on the movant. *United States v. Jefferson County*, 720 F. 2d 1511 (11th Cir. 1983).

The standards for granting injunctive relief are high. 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 afforded 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) *quoting Truly v. Wander*, 5 How. 141, 12 L.Ed. 88 (1847). "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).

The Eleventh Circuit has instructed courts to be more tentative in issuing injunctions when the party to be enjoined is a state governmental entity, 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).

As discussed more fully below, Defendants submit that Plaintiffs cannot carry their burden on any element. If, however, Plaintiffs fail on even one, they are not entitled to relief.

1. *Plaintiffs are not likely to succeed on the merits*

Defendants have already, for the most part, addressed this issue in their motion to dismiss, (Doc. 9-2 at 9-24), but they will summarize those arguments here and additionally address Plaintiffs' First Amendment argument.

a. *Plaintiffs are not likely to succeed on their free exercise claim*

"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). "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). 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).

Plaintiffs concede that no religious belief *requires* the taking of a weapon to a place of worship. (Doc. 6-2 at 10). Instead, Plaintiffs assert a secular desire to carry firearms for protection. As Plaintiffs have identified no religious belief that has been burdened, they fail to state a free exercise claim.

Plaintiffs cite the Eleventh Circuit's ruling in *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1304 (11th Cir. 2000), for the proposition that regulating the operation of a church violates the free exercise clause. Plaintiffs, however, ask *Gellington* to carry more weight than the ruling permits. *Gellington* concerned the so-called "ministerial exception" to Title VII of the employment laws, a judicially-created doctrine which provides that "Title VII is not applicable to the employment relationship between a church and its ministers." *Id.* at 1301. The Court concluded that the exception had not been overruled by an intervening Supreme Court decision because "the exception only continues a long-standing tradition that churches are to be free from government interference in matters of church governance and administration." *Id.* at 1304. In

reaching this conclusion, the Court relied on *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94 (1952). In that case, the Supreme Court struck down a New York statute that purported to intervene in church governance relating to such matters as who could serve as archbishop. *Id.* These decisions refuse to permit governmental interference in anything connected to the *religious* decision making and activities of congregations and religious bodies. Each deals with who may serve in *religious* leadership positions.

The Statute here in issue has no connection to the religious decision making of any Plaintiff. The Statute does not direct who should be the leader of any religious organization and it does not have any alleged impact on any religious ritual or action.[2] The Statute is entirely unconnected to religion except that it provides deterrence to any attacks on places of worship. The Statute does not violate the free exercise clause.

Plaintiffs also spend some effort discussing *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and its entanglement test. *Lemon*, though, is an establishment clause decision. Plaintiffs do not bring an establishment clause claim.

[2] Plaintiffs note that Sikhs are religiously required to carry a certain type of weapon. (Doc. 6-2 at 10 n.5). There is no averment, however, that any Sikh is a plaintiff is this action.

b. *Plaintiffs are not likely to succeed on their Second Amendment claim*

The Second Amendment confers an individual right to keep and bear arms in the home for the purpose of self defense and that right is applicable against the States through the Fourteenth Amendment. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2799, 2822 (2008); *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020, 3050 (2010). The Supreme Court indicated, however, that "the right was not unlimited." *Heller*, 128 S.Ct. at 2799. The Court was clear that

> "nothing in our opinion should be taken to case 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. 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." *Id.*, 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; *United States v. Masciandaro*, 648 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).

i. *Plaintiffs' challenge to 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. But it otherwise declined to pronounce the appropriate level of scrutiny. *Id.*, at 2821. 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, announced that restrictions on the possession of firearms in "sensitive places" are "presumptively lawful," *Heller*, 128 S.Ct. at 2817 n.26, and thus, indicated that strict scrutiny is not appropriate for this class of gun regulations. Accordingly, federal courts have, post-*Heller*, addressed the right to bear arms outside the home under the intermediate scrutiny standard. *United States v. Marzzarella*, ___ F.3d ___, 2010 WL 2947233, 8 (3rd Cir. 2010); *Jones*, 673 F.Supp. at 1355; *United States v. Bledsoe*, 2008 WL 3538717, 4 (W.D.Tex. 2008). 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).

ii. *The Statute is constitutional under the Second Amendment*

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. *United States v. Salerno*, 481 U.S. 739, 750 (1987) ("the government's interest in preventing crime is compelling"); *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. Third and most specifically, the State has a substantial interest in protecting the free exercise of religion. *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

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"). 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 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.

Defendants do not suggest that Plaintiffs desire to bring weapons to places of worship for nefarious purposes. Certainly, at this stage of the proceedings, the Court must accept Plaintiffs' averments that they would carry any weapons for the legitimate purpose of protection. But the State is not equipped to screen every weapon carrier who seeks to enter a "sensitive place" so as to ascertain the acceptability (or lack thereof) of their intentions. Accordingly, to achieve the State's substantial interest in protecting these fundamental locations, a blanket ban is required. Thus, under intermediate scrutiny, the Statute is constitutional.

a. *O.C.G.A. § 16-11-127(b) is constitutional when viewed in conjunction with subsection (d)(2)*

"It is the general rule of construction that an interpretation of an act which would make it unconstitutional will not be adopted unless imperatively required by the wording of the act of the context of the act as a whole." *United States v. 15 Mills Blue Bell Gambling Machines*, 119 F.Supp. 74, 78 (M.D.Ga. 1953); *see also 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"). In light of these principles, the State submits that the Statute must be read in conjunction with subsection (d)(2), which provides that:

> Subsection (b) of this Code section *shall not apply*: . . . . [t]o a license holder 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(d)(2) (emphasis added). Under this subsection, the "security or management personnel" of the place of worship 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. Most pertinently, the decisionmaker can choose to exclude the weapon entirely, 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, *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 flexibility in determining their own security requirements. Certainly, subsection (d)(2) would not allow a weapon in a "sensitive place" to simply be left lying around where anyone (including a small child) might have ready access. But subsection (d)(2) would permit the decisionmaker wide latitude in choosing security measures, from insisting that a weapon be locked in a gun safe to requiring that a handgun be snapped into a holster while carried on the license holder's person.

Especially in relation to "places of worship," subsection (d)(2) allows the Statute 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, the right to determine for themselves whether weapons may be permitted on their 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").

Accordingly, the State's substantial interest in public safety is addressed with minimal burden to any license holder's right to bear arms.

2. *The injunction is not necessary to prevent irreparable injury*

Plaintiffs have not identified any irreparable injury they are likely to suffer. Georgia has long had a statute prohibiting the carrying of weapons to churches, *see* earlier versions of O.C.G.A. § 16-11-127, but Plaintiffs do not explain how they are now injured by the current version of the Statute when they made no claim of injury under the earlier versions. Plaintiffs merely assert that their constitutional

rights have been violated, a contention Defendants dispute. Plaintiffs have not identified any cognizable injury.

3. *The threatened injury does not outweigh the harm the preliminary injunction would cause these Defendants*

At most, Plaintiffs identify an inchoate injury of having their alleged rights violated. Defendants, on the other hand, would be harmed by a decrease in its ability to deter crime and the potential for additional violence. Defendants have a substantial interest in the continued effectiveness and enforceability of one of the State's criminal statutes.

B. The preliminary injunction would be adverse to the public interest

The General Assembly and the Governor, in enacting the Statute and signing it into law, have already weighed the public's interest and determined that it is best served by the existence and enforcement of the Statute. Moreover, as argued in more detail in support of their motion to dismiss and above, Defendants have a compelling interest in the deterrence of crime and violence generally and especially in connection with those "sensitive places" where fundamental constitutional liberties are exercised. *See Salerno*, 481 U.S. at 750 ("the government's interest in preventing crime is compelling"); *Bissell*, 866 F.2d at 1353 (noting "government's compelling regulatory interest in preventing crime").

Plaintiffs, therefore, fail to clearly carry their burden and are not entitled to the issuance of a preliminary injunction.

CONCLUSION

For the foregoing reasons, these Defendants respectfully submit that this Court should deny Plaintiffs' motion for preliminary injunction.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed **RESPONSE OF DEFENDANTS STATE OF GEORGIA AND GOVERNOR PERDUE IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the attorney of record:

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This 20 day of August, 2010.

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