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.	

BRIEF OF DEFENDANTS STATE OF GEORGIA AND GOVERNOR PERDUE IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Come now the State of Georgia and Governor Perdue in his official capacity, by and through counsel, and respond to Plaintiffs' motion for summary judgment (Doc. 20). Defendants already have submitted multiple briefs addressing Plaintiffs' claims and the arguments Plaintiffs make in support of their summary judgment motion (*see* Doc. 9-2; Doc. 10; Doc. 21) and adopt those in response to Plaintiffs' motion.[1] By way of further response, Defendants also show the Court:

[1] Plaintiffs' motion does not address at all Defendants' arguments that the State of Georgia cannot be sued. Plaintiffs therefore presumably concede that point.

A. The requirements to obtain injunctive and declaratory 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).

As shown below and in Defendants' previous briefs, Plaintiffs have not clearly carried their burden.

B. Plaintiffs' motion ignores the applicable canons of statutory construction

"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").

Plaintiffs summary judgment brief entirely ignores subsection (d)(2) of the Statute which provides a significant exception to the Statute that, as discussed previously and below, would appear to give Plaintiffs essentially everything they claim to desire. Defendants request that the Court construe the Statute as a whole. Viewed in context, the Statute is clearly constitutional.

C. The Statute grants churches authority to manage their internal affairs

Plaintiffs complain that the Statute encroaches on churches' ability to manage their affairs by restricting how they may provide security (Doc. 20-2 at 6), but they make this assertion based on a misreading of the Statute. Far from being the claimed "total ban" (*id.* at 19), 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[2] and that has never been explicitly rejected by any Plaintiff.[3] 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 follow its own conscious. No reasonable reading of the Statute can construe this as a Free Exercise violation.

D. Plaintffs' "black shoes" argument makes no sense

In their free-exercise discussion, Plaintiffs pose an unuseful hypothetical concerning a non-existent statute "prohibiting the wearing of black shoes to church when the general law said nothing about wearing black shoes out in public." (Doc.

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[2] In his Declaration, Rev. Wilkins states that "[t]he Tabernacle would like to allow *certain of its members with GWLs* to carry firearms on the Tabernacle's property . . . ." (Doc. 20-5, ¶ 14). 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.

[3] To the extent that a Plaintiff—perhaps Stone or GeorgiaCarry.org on behalf of its members—desires to impose firearm carriage on unconsenting churches, in contravention of the stated wishes of Plaintiff Wilkins or the Tabernacle, then Plaintiffs' counsel would appear to have a conflict of interest.

20-2 at 10). In the unlikely event that the General Assembly would ever pass Plaintiffs' imaginary "black shoes" act, it is, of course, possible that a court might someday find such statute to be constitutionally infirm. In the absence of a plaintiff asserting a religious compulsion to wear black shoes to church, however, the constitutional provision violated would not be the Free Exercise clause.

This argument also is unenlightening because the State has a much greater interest in regulating the possession and use of dangerous weapons than it could ever have in regulating the color of shoes. There is no reason to believe that black (as opposed to red or white) shoes can be used to threaten, intimidate, or harm. Firearms, on the other hand, while certainly available for legitimate uses, are a favored tool of criminals and other villains. *District of Columbia v. Heller*, 128 S.Ct. 2783, 2822 (2008) ("We are aware of the problem of handgun violence in this country . . . ."). Even if Plaintiffs are correct that the State cannot regulate the color of shoes that parishioners wear to church, this does not mean that they cannot regulate the carriage of weapons to the same location. *See id.* ("The Constitution leaves the [government] a variety of tools for combating [gun violence], including some measures regulating handguns").

Next, Plaintiffs argue that the Statute "serves no other purpose than to inhibit religion." (Doc. 20-2 at 9). If this understanding of the Statute is credited, then it

must also be that the Statute inhibits the operations of the courts, governments, polling locations, bars, nuclear power facilities, and the like. This makes no sense. Instead, by keeping weapons out of these locations—unless those weapons are carried by those the management of each has decided can be trusted—the Statute provides for the safe operation of the functions provided by each facility.

E. The Statute is not an impediment to the free exercise of religion

In their brief, Plaintiffs accurately state that "Defendants have not argued that the Church Carry Ban is neutral and of general applicability." (Doc. 20-2 at 7). Plaintiffs then inexplicably spend the next several pages of their brief arguing that the Statute is not neutral and of general applicability. (*Id.* at 7-12). Defendants fully acknowledge, as they always have, that the Statute concerns only the possession of weapons in specific locations. For the reasons discussed in their prior briefs, Defendants simply submit that they are not constitutionally required to act neutrally concerning those specific "sensitive places."

It is not as if Plaintiffs have made any showing that the Statute impedes the practice of any faith. They have conceded that they are not religiously required to bring a firearm to church. (Doc. 6-2 at 10). Without such a religious obligation, the Free Exercise clause is not implicated. *See Watts v. Fla. Internat'l Univ.*, 495

F.3d 1289, 1297 (2007) (a free exercise plaintiff must show "that he believes his religion *compels* him to take the actions" allegedly being burdened).

F. Plaintiffs' arguments concerning home worship are not properly before the Court and have no merit

In the summary judgment brief, Plaintiffs, for the first time, express a concern about the Statute being applied to worship services in the home (Doc. 30-2 at 18), a location specifically protected by the Supreme Court's rulings in *Heller* and *McDonald*. These arguments are not properly before the Court, and, even if they are, they have no merit.

1. *Plaintiffs have not pled a claim concerning home worship*

To state a claim, a complaint "must contain . . . a short and plain statement of the claim, showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). "[C]omplaints in § 1983 cases must now contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Randall v. Scott*, 610 F.3d 701, 707 n.2 (11th Cir. 2010). Although the rules of civil procedure set forth liberal pleading standards, this does not afford a plaintiff with an opportunity to raise new claims at the summary judgment stage. *Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1314 (11th Cir. 2004). A plaintiff may not amend his complaint through a brief

opposing summary judgment. *Id.* at 1315. Similarly, Plaintiffs should not be allowed to amend their complaint in a motion seeking judgment in their favor.

Plaintiffs' complaint and amended complaint make no mention of houses or home worship. (Doc. 1-2; Doc. 5). Instead, these documents give notice only of claims concerning worship (and, for Rev. Wilkins, employment) that occurs at churches. Plaintiffs have not properly placed any claim concerning home worship before the Court. Accordingly, this portion of their summary judgment brief should be ignored.

2. *The Statute does not apply to home worship*

The locations specified in O.C.G.A. § 16-11-127(b) are places where business of some sort (using the term "business" generally) is conducted and which are open at least in part to the general public. Nothing in the Statute indicates that it applies to homes when worship activities occur there.

Courts should not impose absurd or implausible interpretations on statutes. *See Davis*, 489 U.S. at 809; *DBB, Inc.*, 180 F.3d at 1281. No doubt the majority of believers of most, if not all, faiths, from time to time engage in home-based activities that would fall within the definition of "worship." The Statute contains no suggestion that the General Assembly wished to apply it to these activities.

G. The scope of Plaintiffs' right to keep and bear arms is not controlled by what was permitted at the time the Second Amendment was enacted

Plaintiffs assert, without support, that "[b]ecause the right to carry firearms in churches was not restricted (and was even required to be exercised) at the time of the Second Amendment's ratification, the right is within the scope of the Amendment." (Doc. 20-2). Plaintiffs' contention, however, has at least two flaws.

First, the mere fact that something may have been permitted (or even required) at the time that the Bill of Rights was enacted does not mean that the Constitution requires that such now be recognized as a constitutional right. Second, and more to the point, because this case concerns the application of the Second Amendment to the States, the applicable amendment and the pertinent time period is that surrounding the Fourteenth Amendment, not the Second. *See McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020, 3042 (2010) (analyzing the intent and meaning of "the Framers and ratifiers of the Fourteenth Amendment").

The Fourteenth Amendment was proposed in June 1866 and achieved ratification on July 9, 1968. *See* http://www.usconstitution.net/constamrat.html. Surely it is not insignificant that the original version of the challenged Statute was enacted little more than two years later. *See Hill v. State*, 53 Ga. 472, 2 (1874) (referring to and quoting "[t]he act of October, 1870"). While such enactment would not guarantee the constitutionality of the Statute, it provides better evidence

of the understanding at the time of the Fourteenth Amendment's ratification than any historical claim made by Plaintiffs. Plaintiffs' limited historical arguments add nothing meaningful to their claims.

CONCLUSION

For the foregoing reasons and for the reasons previously argued, Defendants respectfully submit that this Court should grant their motion to dismiss and deny Plaintiffs' motion for summary judgment.

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CERTIFICATE OF SERVICE

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

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This 6th day of October, 2010.

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