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.	

DEFENDANTS STATE OF GEORGIA AND GOVERNOR PERDUE'S BRIEF IN SUPPORT OF PRE-ANSWER MOTION TO DISMISS

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 support of their motion to dismiss, showing the Court as follows:

I. PLAINTIFFS' CLAIMS

In its most recent legislative session, the Georgia General Assembly amended O.C.G.A. § 16-11-127 (the Statute) so that it now reads, in pertinent part:

> A person shall be guilty of carrying a weapon or long gun[1] 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.

O.C.G.A. § 16-11-127(b). Governor Perdue signed the bill into law on June 4, 2010, and it became effective that day.

Plaintiffs, two organizations and two individuals, seek a declaration that the Statute is unconstitutional both facially and as applied and an injunction forbidding its enforcement. (R5, ¶¶ 39-54). More specifically, Plaintiffs assert that the

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

Statute violates their First Amendment right to the free exercise of religion (Counts 1 and 2) and their Second Amendment right to keep and bear arms (Counts 3-4). (*Id.*). Count 5 is not an additional claim so much as a reassertion of all prior claims under a new heading. (Doc. 5, ¶¶ 51-54).

II. ARGUMENT AND CITATION OF AUTHORITY

A. The State of Georgia cannot be sued

1. *Plaintiffs' claims against the State of Georgia are 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 v. Michigan Dep't of State Police*, 491 U.S. 58, 63 (1989); *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 sovereign 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). The State is immune.

2. *The State is not a person within the meaning of 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. 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 is not a person under § 1983 and thus cannot be a defendant in a § 1983 action. Accordingly, Plaintiff cannot pursue a constitutional claim against the State.

B. Plaintiffs lack standing to present the asserted claims

In order to establish standing, a plaintiff must adequately allege and ultimately prove, three elements: (1) that he has suffered an "injury-in-fact;" (2) a causal connection between the asserted injury-in-fact and the challenged conduct of the defendant; and (3) that the injury likely will be redressed by a favorable

decision. *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). These requirements are the "irreducible minimum" required by the Constitution for a plaintiff to proceed in federal court. *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 664 (1993) In addition, plaintiffs seeking injunctive relief lack standing unless they allege facts giving rise to an inference that they will suffer future harm at the hands of the defendant. *Shotz*, 256 F.3d at 1081. "[A] party has standing to seek injunctive relief only if the party alleges, and ultimately proves, a real and immediate—as opposed to a merely conjectural or hypothetical—threat of future injury." *Church v. City of Huntsville*, 30 F.3d 1332, 1337 (11th Cir. 1994); *see also Bowen v. First Family Fin. Servs.*, 233 F.3d 1331, 1340 (11th Cir. 2000).

None of the Plaintiffs has standing to assert the free exercise claim. Additionally, the Tabernacle does not have standing to raise a Second Amendment claim.

1. *The individual Plaintiffs do not have standing to raise a free exercise claim*

A plaintiff asserting a free exercise claim "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). That plaintiff must "believe[] his religion *compels* him to take the actions" allegedly being burdened. *Id.*, at 1297 (emphasis added). Without such allegations, a plaintiff has no standing to pursue a free exercise claim. *McGowan v. State of Maryland*, 366 U.S. 420, 429 (1961).

Neither individual Plaintiff asserts that he has *any* religious beliefs, although such might generally be inferred for Wilkins given his role as a minister. (Doc. 5, ¶ 24). Stone, on the other hand, merely claims that he regularly attends religious services, (*id.*, ¶ 18), which might mean that he holds religious beliefs of some sort or might mean simply that he seeks the community standing or family unity that often attaches to such attendance. Notably, neither individual Plaintiff alleges that his religious beliefs *require* him to bring a weapon to church. Without such an allegation, the individual Plaintiffs have no standing to pursue the free exercise claim.

2. *Organizational standing*

In the absence of injury to itself, an association may have standing solely as the representative of its members. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). For an organization to have such representational standing, it must meet the three-part test articulated by the Supreme Court in *Hunt v. Washington State Apple*

Advertising Commission, 432 U.S. 333 (1977). Under the *Hunt* test, an association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of the individual members. *Id.* at 343.

a. *Neither organization has standing to pursue a free exercise claim*

Neither GCO nor the Tabernacle appears to be suing in its own right. Instead, each organization seems to be pursuing claims as a representative of its members. Both fail steps 1 and 2 of the *Hunt* test.

First, it is not at all clear that the members of either organization would have standing in their own right. Each organization has a member who is a Plaintiff here. In fact, each individual Plaintiff is not merely a member of one of the organization, but is or was effectively its leader (Doc. 5, ¶¶ 6-7), and thus, presumably a highly representative member. But, as discussed above, neither has standing to raise the free exercise claim.

Second, the First Amendment interest asserted here would not appear to be germane to either organization's purpose. GCO is a secular organization "whose mission is to foster the rights of its members to keep and bear arms." (*Id.*, ¶ 2).

Nothing in its purpose is connected to the free exercise of religion. The Tabernacle, to be sure, is a religious organization which likely has some interest in the operation of the free exercise clause. Nothing in the complaint, however, even hints that the Tabernacle (or its members) has a *religious* interest in the possession of weapons in its place of worship. Accordingly, the interests asserted herein are not germane to the Tabernacle's purpose.

Both GCO and the Tabernacle fail at least two parts of the three-part *Hunt* test regarding the First Amendment claim raised. Accordingly, neither has standing to present that claim.

b. *The Tabernacle does not have standing to pursue the Second Amendment claim*

The Tabernacle fails the second step of the *Hunt* test. In the Complaint, it describes itself as a church. (Doc. 5, ¶ 3). Nothing in the Complaint suggests that gun rights are germane to its purpose. Accordingly, the Tabernacle does not have standing to raise the Second Amendment claim.

C. Plaintiffs cannot bring actions directly under the Constitution

Counts 2 and 4 appear to be largely duplicative of, respectively, Counts 1 and 3 except that Counts 1 and 3 purport to be "Direct Action[s]," while Counts 2 and 4 are brought under 42 U.S.C. § 1983. When § 1983 provides a remedy, however, an implied cause of action grounded directly on the Constitution is not

available. *See Carlson v. Green*, 446 U.S. 14, 18-19 (1980); *Davis v. Passman*, 442 U.S. 228, 246-48 (1980); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 397 (1971); *Williams v. Bennett*, 689 F.2d 1370, 1390 (11th Cir. 1982); *Bell v. Houston County, Ga.*, 2006 WL 1804582, 1 n.1 (M.D.Ga. 2006). Accordingly, Counts 1 and 3 must be dismissed.

D. Plaintiffs fail to state a claim upon which relief may be granted

1. *The applicable legal standards*

a. *The requirements to plead a cause of action*

In considering a motion to dismiss for failure to state a claim, the Court must accept the allegations in the complaint as true and construe them in the light most favorable to the plaintiff. *Kyle K. v. Chapman*, 208 F.3d 940, 942 (11th Cir. 2000). A court should begin by identifying the allegations that are not entitled to the presumption of truth. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1951 (2009). "[T]he court is not required to accept a plaintiff's legal conclusions." *Sinaltrainal v. The Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009) (internal quotations omitted); *see also Amer. Dental Assoc. v. Cigna Corp.*, 605 F.3d 1283, 1290 (11th Cir. 2010) (the first part of a "two-pronged approach" is to "eliminate any allegations in the complaint that are merely legal conclusions").

The court then is to consider the factual allegations to determine if they plausibly suggest an entitlement to relief. *Iqbal*, 129 S.Ct. at 1951. A court is to make reasonable inferences in the plaintiff's favor, but it is not required to draw plaintiff's inferences. *Sinaltrainal*, 578 F.3d at 1260. The "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[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*, No. 09-12862 man.op at 11 n.2 (11th Cir. June 30, 2010).

b. *Statutory construction*

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).

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).

c. *Facial and as-applied invalidity*

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).

d. *The framework for analyzing a § 1983 claim*

Plaintiffs bring an action alleging violations of their constitutional rights under 42 U.S.C. § 1983. Section 1983, though, is not a source of rights; rather it is a means of vindicating federal rights. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). When a court considers a § 1983 claim, it must first identify the specific right allegedly infringed. *Id.* Whether a violation has occurred can only be determined by applying the standards applicable to that particular provision. *Graham v.*

Connor, 490 U.S. 386, 394 (1989). Plaintiff's two counts are based on the free exercise clause of the First Amendment and the right to keep and bear arms under the Second Amendment.

2. *The Statute does not violate the 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).

In Count 1, Plaintiff's allege in conclusory fashion that the statute "interferes with the free exercise of religion by Plaintiffs . . . ." (Doc. 5, ¶¶ 39, 42). The facts averred in the complaint, however, do not support this claim.

As discussed in part above, no Plaintiff alleges that a sincerely held religious belief *requires* the taking of a weapon to a place of worship.[2] 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). As Plaintiffs have identified no religious belief that has been burdened, they fail to state a free exercise claim.

3. *The Statute does not violate the Second Amendment*

In 2008, the Supreme Court concluded that the Second Amendment confers an individual 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"). More recently, in *McDonald*, the Supreme Court held that "the Second Amendment right recognized in *Heller*" was

[2] Indeed, Plaintiff's concede this point in their injunction motion. (Doc. 6-2 at 10).

applicable against the States through the Fourteenth Amendment. 130 S.Ct. at 3050.

The Supreme Court indicated, however, that "the right was 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 stated 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 (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." *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 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 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).

a. *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; *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.[3] Following this logic, 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) (ban on possession of handgun with obliterated serial number evaluated under intermediate scrutiny); *Jones*, 673 F.Supp. 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). Under intermediate scrutiny, a regulation is

[3] *McDonald* does refer to the right to bear arms as "fundamental," 130 S.Ct. at 3042, but the Court was referring to the right as 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. 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).

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).

b. *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. *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"); *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.[4] Third and most specifically, the State has a substantial

[4] 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*

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

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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").

focus on spiritual activities, many of which are inconsistent with protective vigilance.[5]

The State does not mean to suggest that Plaintiffs desire to bring weapons to places of worship for any of these 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, nor could it ever be, 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.

c. *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 United States v. Witkovich*, 353 U.S. 194, 199 (1957) ("A restrictive meaning for

[5] 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.

what appear to be plain words may be indicated by the Act as a whole . . . that such a restrictive meaning must be given if a broader meaning would generate constitutional doubts"); *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, if the Court has constitutional doubts concerning O.C.G.A. § 16-11-127(b), it must read the limitations of that subsection in light of subsection (d)(2), which provides that:

> Subsection (b) of this Code section *shall not apply*: . . . . [t]o a license holder[6] 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 (or other "sensitive 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

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

to hold the appropriate license. (R1-2, Complaint, ¶¶ 13, 19). Second, the license holder must notify the 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, 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 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 seem to 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,[7] 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.

d. *The Statute is not facially unconstitutional under the Second Amendment*

To be facially invalid, the law must be unconstitutional in *all* of its applications. *Washington State Grange*, 128 S.Ct. at 1190. It is not difficult to

[7] While there are no doubt exceptions, the State submits that most "places of worship" are likely to be situated on private property.

imagine circumstances in which the Statute can be applied in a constitutional manner. And if such an exercise of the State's police power is permitted, then the Statute is not facially invalid.

III. CONCLUSION

For the foregoing reasons, these Defendants respectfully submit that their motion to dismiss should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed **DEFENDANTS STATE OF GEORGIA'S BRIEF IN SUPPORT OF PRE-ANSWER MOTION TO DISMISS** 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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And I also served this document by U.S. Mail to:

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This 20th day of August, 2010.

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