No. ________

In The
Supreme Court of the United States

GEORGIACARRY.ORG, INC., THE BAPTIST TABERNACLE OF THOMASTON, GEORGIA INC., EDWARD STONE, AND JONATHAN WILKINS,

Petitioners,

v.

THE STATE OF GEORGIA, UPSON COUNTY, GEORGIA, GOVERNOR OF GEORGIA, AND COUNTY MANAGER KYLE HOOD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A single question is presented:

> Does a state criminal law that targets religion, and is neither neutral nor generally applicable, pass strict scrutiny muster under the Free Exercise Clause of the First Amendment?

PARTIES TO THE PROCEEDING

The Parties below are listed in the caption.

CORPORATION DISCLOSURE STATEMENT

Neither GeorgiaCarry.Org, Inc. nor The Baptist Tabernacle of Thomaston, Georgia, Inc. have parent corporations, and no publicly held corporations own 10% or more of the stock of either.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATION DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT ON JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	14

APPENDIX

July 20, 2012 Opinion of the United States Court of Appeals for the Eleventh Circuit	App. 1
January 24, 2011 Order on Motions to Dismiss of the United States District Court for the Middle District of Georgia	App. 45
January 25, 2011 Judgment of the United States District Court for the Middle District of Georgia	App. 82

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993)........................5, 8, 9

Grace United Methodist Church v. Cheyenne, 427 F.3d 775 (10th Cir. 2005) 10

Hartmann v. Stone, 68 F.3d 973 (6th Cir. 1995)........10

McTernan v. City of York, 564 F.3d 636 (3d Cir. 2009) 6

River of Life Kingdom Ministry v. Village of Hazel Crest, 585 F.3d 364 (7th Cir. 2009) 10

San Jose Christian College v. Morgan Hill, 360 F.3d 1024 (9th Cir. 2004) 10

Tenafly Eruv Association, Inc. v. Borough of Tenafly, 309 F.3d 144 (3d Cir. 2002).........................9

CONSTITUTION

U.S. Const. amend. I 1

RULES

Fed.R.Civ.Proc. 12(b)(6)..3

FEDERAL STATUTES

28 U.S.C. § 1254(1)...1

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

O.C.G.A. § 16-11-127(b) 2
O.C.G.A. § 16-11-127(c) 12
O.C.G.A. § 16-11-127(d)(2) 13

OPINIONS BELOW

The United States Court of Appeals issued an opinion on July 20, 2012 (ordered published), affirming the opinion of the United States District Court for the Middle District of Georgia issued on January 24, 2011, reported at 764 F.Supp.2d 1306 (M.D. Ga., 2011).

STATEMENT ON JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). The Eleventh Circuit's opinion was rendered on July 20, 2012.

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides, "Congress shall make no law respecting an establishment of religion, nor prohibiting the free exercise thereof. . . ."

STATEMENT OF THE CASE

In 2010, the State of Georgia revised its statutes pertaining to the carrying of weapons. The revisions repealed some restrictions that had been on the books since immediately after the Civil War, including residual Jim Crow prohibitions. In place of broad prohibitions on carrying weapons in many public

places, the State declared that a person with a "weapons carry license" may carry a weapon in "any location in this state," except for eight explicitly listed off limits locations. The exception of interest in this case is "places of worship."[1]

After passage of the law, Petitioners commenced this action in the Superior Court of Upson County, Georgia. Petitioners are GeorgiaCarry.Org, Inc. ("GCO"), the Baptist Tabernacle of Thomaston, Georgia, Inc., Edward Stone, and Jonathan Wilkins. GCO is a non-profit organization whose purpose is to foster the rights of its members to keep and bear arms. The Baptist Tabernacle is a religious institution that operates a "place of worship." The Tabernacle is

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[1] O.C.G.A. § 16-11-127(b) says, in pertinent part:

A person shall be guilty of carrying a weapon or long gun 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 . . . ;

(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 plant . . . ;

(8) Within 150 feet of any polling place. . . . ;

Subsection (c) says that a "license holder . . . shall be authorized to carry a weapon . . . in every location in this state not listed in subsection (b). . . ."

located in Upson County, Georgia. Stone is a member of GCO who regularly attends worship services, who possesses a Georgia weapons carry license, and who wishes to carry a firearm with him when he attends worship services, for the purpose of protecting his family and himself. Wilkins is a member of GCO, is the CEO and pastor of the Tabernacle. He also possesses a weapons carry license, he regularly attends worship services, and he would like to carry a firearm at the Tabernacle's worship facility for protection of himself and others at the church.

Petitioners brought this case against the State of Georgia and Upson County, Georgia under various state and federal theories, including the theory on appeal in this case. Respondents removed the case to federal district court, whereupon Petitioners amended their complaint to add the governor of Georgia and the Upson County manager as defendants. Petitioners sought a declaration that the prohibition on carrying weapons in "places of worship" (the "Carry Ban") is unconstitutional, with an appropriate injunction. The District Court dismissed the case pursuant to Fed.R.Civ.Proc. 12(b)(6) on January 24, 2011.

Petitioners filed a notice of appeal on January 26, 2011, and the Eleventh Circuit affirmed on July 20, 2012.

REASONS FOR GRANTING THE WRIT

The decision of the Eleventh Circuit has created a split among the circuits and appears to conflict with this Court's precedent.

The Free Exercise Clause is one of our most cherished and highly protected freedoms in the Bill of Rights. It is therefore important for the courts to play their vital role in the process of ensuring the provisions of that Clause.

The Carry Ban specifically targets religion in that it explicitly applies to "places of worship." A person with a license may carry a weapon in stores, banks, restaurants (even restaurants that serve alcohol), shopping malls, parks, while walking down public streets and riding in public transportation. But, he cannot carry a weapon in a place of worship.

The Carry Ban is exceptional in that Georgia law has a provision that specifically authorizes a license holder to carry a weapon "in any location in this state" except the listed off-limits places. That is, carrying a weapon generally is not a crime in Georgia.[2] The essential element of the crime defined in the Carry Ban is not the carrying of a weapon. The essence of the crime is that it is done "in a place of worship."

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[2] Georgia also has repealed the crime of carrying a concealed weapon, so there no longer is a distinction in Georgia law based on open or concealed carry.

"[I]f the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). "A law lacks facial neutrality it if refers to a religious practice without a secular meaning discernible from the language or context." *Id.*

The Carry Ban does not refer to a religious ***practice*** *per se*, but it nonetheless lacks neutrality. "Official action that targets religious ***conduct*** for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality." *Id.* at 534 [Emphasis supplied].

Because the essence of the crime is that it is in a "place of worship," the law clearly gives distinctive treatment to conduct that has religious motivations. It is self-evident that the primary reason for visiting a "place of worship" is to engage in worship. Worship is inherently a religiously-motivated activity.

In the instant case, moreover, it is not necessary to dwell for long on whether the Carry Ban is neutral and generally applicable. The State conceded that the Carry Ban is neither. The State insisted, however, that unless a law burdens a sincerely-held religious ***belief***, the law is valid, regardless of the lack of neutrality and general applicability.

The Third Circuit has ruled, "Government action is not neutral and generally applicable if it burdens

religiously motivated conduct but exempts substantially comparable conduct that is not religiously motivated." *McTernan v. City of York*, 564 F.3d 636, 647 (3d Cir. 2009). "When a law that burdens religion is not neutral or not of general application, strict scrutiny applies and the government action violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest." *Id.* at 647.

The Carry Ban clearly burdens "religiously motivated conduct but exempts substantially comparable conduct that is not religiously motivated." The Carry Ban burdens the religiously-motivated conduct (of attending worship services at a place of worship) by regulating how or what a worshipper can do with a weapon while he is worshipping. At worst, the worshipper is forbidden from carrying a weapon. At best, he must seek out permission to carry the weapon each and every time he enters the place of worship (this permission aspect is discussed in greater detail below).

On the other hand, the same worshipper is not burdened at all in the carriage of his weapon when he goes to the bank, eats dinner and has cocktails at a restaurant, rides a city bus, or walks down the street. In other words, when the conduct is purely secular and unrelated to place of worship, the Carry Ban does not apply. When the conduct is religiously motivated (attending a place of worship), the Carry Ban applies.

Ironically, then, the same conduct at the same type of event is criminalized just if it occurs at a place of worship, but not elsewhere. Consider, for example, attending a basketball game. If the gymnasium hosting the game is a public one, there is no crime in carrying a weapon. If the gymnasium is part of a church, carrying a weapon there is a crime.

The Eleventh Circuit declined to consider whether the Carry Ban is or is not neutral and generally applicable. Instead, the court said that "*all* Free Exercise Clause challenges must include allegations that the law at issue creates a constitutionally impermissible burden on a sincerely held religious belief." App. 22 [emphasis in original]. The Court thus refused to consider whether a burden on religiously-motivated ***conduct*** could run afoul of the Free Exercise Clause.

The logical extension of the Eleventh Circuit's holding is that states are free to inconvenience worshippers as worshippers as long as they do so in a secular way. The following examples illustrate potential results:

1. A law that forbids parking on streets adjacent to places of worship is fine, even though parking on streets adjacent to other types of buildings is not forbidden.

2. More rigorous building codes for churches than for retail buildings are okay. Church members may be financially burdened (thus burdening their religiously-motivated

conduct of joining a church), but as long as their religious beliefs do not include refusing to comply with the building codes, there is nothing to be done about it.

3. Temples can be barred from having playground equipment on their property, even if other property owners are not so burdened. As long as congregants do not have a sincerely-held religious belief that requires them to swing or ride a teeter-totter, the government is free to impose such uneven prohibitions.

The Eleventh Circuit holding is contrary to this Court's precedent, as well as other Circuits'. In *Lukumi*, this Court cautioned that "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. . . . The Court must survey meticulously . . . to eliminate, as it were, religious gerrymanders." 508 U.S. at 534.

The Carry Ban is just the sort of "religious gerrymander" this Court must guard against. It is not enough that the Carry Ban does not call out religious beliefs. It creates gerrymandered islands (places of worship) where otherwise permissible conduct becomes regulated or banned. This the State may not do.

This Court concludes in *Lukumi*, "Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these

constitutional principles, and they are void." 508 U.S. at 547. The Carry Ban was likewise enacted contrary to these principles. It persecutes or oppresses religion by imposing burdens on worshippers and religious institutions that it does not impose generally throughout the State. The Carry Ban is void.

The Eleventh Circuit went so far as to rule that a law is not even subject to Free Exercise Clause analysis if it does not burden a sincerely-held religious belief. App. 21-22. That is, a burden on religiously-motivated conduct is not enough. The Eleventh Circuit found that the other Circuits agree with this position. In fact, there is a split among the circuits.

The Third Circuit has held:

> [I]f the law is not neutral (i.e., if it discriminates against religiously motivated conduct) or is not generally applicable (i.e., if it proscribes particular conduct only or primarily when religiously motivated), strict scrutiny applies and the burden on religious conduct violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest.

Tenafly Eruv Association, Inc. v. Borough of Tenafly, 309 F.3d 144, 165 (3d Cir. 2002). The Third Circuit thus treats neutrality and general applicability as threshold issues for determining standard of review. The Eleventh Circuit, however, treats "sincerely-held religious belief" as the sole threshold test and does not consider religiously-motivated conduct.

Likewise, other Circuits do not ignore the "neutral and generally applicable" test in favor of a threshold test of the existence of sincerely-held religious beliefs. In *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995), the Sixth Circuit considered an Army regulation forbidding religious instruction or activities at on-base "private" day-care providers. The Court did not address whether the plaintiffs in that case had sincerely-held religious beliefs that their children must receive religious instruction in day-care. Instead, the Court looked to whether the regulation was neutral and generally applicable toward religion. The Court easily found that the regulation was not neutral and, applying strict scrutiny, struck the regulation down.

In *Grace United Methodist Church v. Cheyenne*, 427 F.3d 775 (10th Cir. 2005), the Tenth Circuit examined a zoning ordinance and its Free Exercise Clause effects on a church seeking to operate a day care. The Court did not address whether there were sincerely-held religious beliefs that required the operation of a day care. Instead, the Court only considered whether the zoning ordinance at issue was neutral and generally applicable (and determined that it was).

In *River of Life Kingdom Ministry v. Village of Hazel Crest*, 585 F.3d 364 (7th Cir. 2009), the Seventh Circuit did not address the existence of sincerely-held religious beliefs for a zoning variance. Again, the Court only looked at the neutrality and general applicability of the zoning law. *San Jose Christian College v. Morgan Hill*, 360 F.3d 1024 (9th Cir. 2004) is a very similar case out of the Ninth Circuit.

In short, Petitioners cannot find a single other case from any Circuit in which the court required an inquiry into the religious beliefs of the plaintiffs bringing a Free Exercise claim before considering whether the law at issue was neutral and generally applicable. Quite the contrary, the neutrality and general applicability of the law is the threshold question. If neutrality and general applicability are found, then the burden on religious beliefs ***or religiously motivated conduct*** are examined.

In the instant case, because the State has conceded that the Carry Ban is not neutral and generally applicable, strict scrutiny applies and the burden shifts to the State to justify the Carry Ban.

The usual "narrowly tailored to advance a compelling state interest" test applied for strict scrutiny cases is a severe and difficult burden to overcome. If that test were applied to the Carry Ban, it is difficult to see how the law could stand. The fact that licensees are permitted to carry weapons in "any location in [Georgia]" except for a very few exceptions (one of which is places of worship) calls into question the compelling governmental interest in regulating the carrying of weapons generally. The State gave no indication of how there is a compelling governmental interest in banning carrying weapons in places of worship but not in banks, restaurants that serve alcohol, or even public transportation, streets, and sidewalks.

Even if there were a compelling governmental interest, however, the Carry Ban cannot in any way be considered "narrowly tailored." The law is both underinclusive and overinclusive.

Georgia law already contains a separate provision making clear that a private property owner may ban weapons from his premises. O.C.G.A. § 16-11-127(c). Thus, if a "place of worship" wants to, it certainly has the power to ban weapons itself. The State cannot therefore claim to be protecting places of worship with its Carry Ban. If that is the State's interest, then no further action is needed beyond the private property owner's power to ban weapons if that is what it chooses to do. Instead, however, the State has inserted itself into the affairs of worship centers, dictating whether and how weapons may be carried there.

The district court ruled that a "savings" clause contained in the Carry Ban code section permits places of worship to grant some forms of permission to carry. That provision says the Carry Ban shall not apply:

> To a license holder who approaches security or management personnel upon arrival at a location described in subsection (b) of this Code section [e.g., a place of worship] 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). The district court ruled that the "securing" option in this provision includes securing a weapon in its holster on the person.

While this conclusion is less than obvious, the interpretation undercuts any narrow tailoring the State could claim. If in fact it is possible for a place of worship, through its security or management personnel, to grant *ad hoc* permission to carry a weapon, then the Carry Ban is nothing more than a ridiculous burden imposed on worshippers but not imposed on others.

If a patron of a restaurant that serves alcohol carries a weapon there, he need not seek out "security or management" upon arrival and ask what to do with his weapon. The Carry Ban imposes that requirement upon a worshipper each and every time the worshipper arrives at the place of worship.[3] The worshipper is therefore burdened in ways that the restaurant customer is not, solely because the establishment the worshipper has entered is a "place of worship."

[3] There is no provision for any kind of "blanket" permission.

CONCLUSION

This Court should grant the Petition to accept this case. A law that is neither neutral nor generally applicable targets religion, and such a law should be subject to strict scrutiny.

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-10387

D.C. Docket No. 5:10-cv-00302-CAR

GEORGIACARRY.ORG, INC., THE BAPTIST TABERNACLE OF THOMASTON GEORGIA INC., EDWARD STONE, JONATHAN WILKINS,

Plaintiffs-Appellants,

versus

THE STATE OF GEORGIA, UPSON COUNTY GEORGIA, GOVERNOR OF GEORGIA, COUNTY MANAGER KYLE HOOD,

Defendants-Appellants.

Appeal from the United States District Court
for the Middle District of Georgia

(July 20, 2012)

Before TJOFLAT, CARNES and ANDERSON, Circuit Judges.

TJOFLAT, Circuit Judge:

In 2010, the Georgia legislature, apparently concerned that the carrying of weapons[1] and long guns[2] would likely present an unreasonable risk of harm to people who assemble in eight specific locations, enacted a statute barring the unrestricted carrying of weapons or long guns in those locations. O.C.G.A. § 16-11-127(b) (this provision is hereinafter referred to as the "Carry Law").[3] This statutory bar

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[1] A "weapon" is a "knife or handgun." O.C.G.A. § 16-11-125.1(5). A knife is "a cutting instrument designed for the purpose of offense and defense consisting of a blade that is greater than five inches in length which is fastened to a handle." *Id.* § 16-11-125.1(2). This case involves the carrying of a handgun.

[2] A "long gun" is a "firearm with a barrel length of at least 18 inches and overall length of at least 26 inches designed . . . to be fired from the shoulder[.]" *Id.* § 16-11-125.1(4).

[3] O.C.G.A. § 16-11-127 reads, in relevant part:

> (b) A person shall be guilty of carrying a weapon or long gun 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 . . . ;
>
> (6) In a bar . . . ;
>
> (7) On the premises of a nuclear power facility . . . ; or
>
> (8) Within 150 feet of any polling place
>
> (c) Except as provided in Code Section 16-11-127.1, a license holder or person recognized under subsection

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does not apply, however, to a license holder[4] if, on arriving at one of the eight locations, such person "approaches security or management personnel upon arrival . . . and notifies such security or management

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> (e) of Code Section 16-11-126 shall be authorized to carry a weapon as provided in Code Section 16-11-135 and in every location in this state not listed in subsection (b) of this Code section; provided, however, that private property owners or persons in legal control of property through a lease, rental agreement, licensing agreement, contract, or any other agreement to control access to such property shall have the right to forbid possession of a weapon or long gun on their property, except as provided in Code Section 16-11-135. A violation of subsection (b) of this Code section shall not create or give rise to a civil action for damages.
>
> (d) Subsection (b) of this Code section *shall not apply*:
>
> > . . .
> >
> > (2) To 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[.]

(emphasis added).

[4] O.C.G.A. § 16-11-126 describes under what circumstances a person needs a weapons carry license in order to possess and carry a weapon or long gun. In essence, the statute prohibits carrying a weapon or long gun without a valid license, unless the carrying falls under one of seven situations not relevant to this case.

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." *Id.* § 16-11-127(d)(2). The refusal to approach security or management personnel or to comply with management's direction is a misdemeanor. *Id.* § 16-11-127(b).

One of the eight locations designated in the Carry Law is a "place of worship." *Id.* § 16-11-127(b)(4). In this case, Edward Stone and Jonathan Wilkins ("Plaintiffs") each allege in their Amended Complaint that they regularly attend religious services, possess a weapons carry license, and "would like to carry a handgun" while in a place of worship. Plaintiffs seek a declaration that the Carry Law is unconstitutional on its face and as applied to them because compliance with § 16-11-127 will violate their First Amendment right to the free exercise of their religion[5] and their Second Amendment right to bear arms.[6] The United States District Court for the Middle District of Georgia found no merit in either claim and dismissed the Amended Complaint with prejudice pursuant to

[5] The First Amendment provides, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. amend. I.

[6] The Second Amendment reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II.

Federal Rule of Civil Procedure 12(b)(6).[7] Plaintiffs now appeal the District Court's judgment, arguing that the allegations in the Amended Complaint are sufficient to make out a case that the Carry Law's place of worship provision is unconstitutional either on its face or as applied to Plaintiffs.[8]

I.

This case began on July 12, 2010, in the Superior Court of Upson County, Georgia. Plaintiffs sued the State of Georgia and Upson County in a two-count complaint presenting the constitutional claims referred to above and seeking declaratory and injunctive relief under 42 U.S.C. § 1983 in the Superior Court of Upton County.[9] The State and the County

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[7] Federal Rule of Civil Procedure 12(b)(6) provides that a district court may grant a motion to dismiss for a "failure to state a claim upon which relief can be granted."

[8] GeorgiaCarry.Org, Inc., and the Baptist Tabernacle of Thomaston, Georgia, Inc., co-plaintiffs with Stone and Wilkins, also appeal the District Court's judgment. GeorgiaCarry.Org has members who, like Stone and Wilkins, possess a weapons carry license, regularly attend religious services, and "would like to carry a handgun" in "places of worship." Baptist Tabernacle "would like to have [its] members armed for the protection of its members attending worship services." Since the claims of GeorgiaCarry.Org and Baptist Tabernacle are essentially identical to Stone's and Wilkins's, this opinion does not refer to these co-plaintiffs unless necessary for context.

[9] 42 U.S.C. § 1983 states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . .

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removed the case to the District Court pursuant to 28 U.S.C. §§ 1441 and 1446. Plaintiffs amended their complaint to add two defendants, the Governor of Georgia and the Manager of Upson County, and two counts. Their Amended Complaint then read as follows: Count 1, a "direct action," asserted that the Carry Law "interfered with" Plaintiffs' free exercise of religion; Count 2, brought under § 1983, replicated Count 1; Count 3, another "direct action," asserted that the Carry Law infringes Plaintiffs' right to keep and bear arms; Count 4, brought under § 1983, replicated Count 3.[10]

The State of Georgia and the Governor jointly moved to dismiss the Amended Complaint under

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> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

[10] The Amended Complaint contained a fifth count seeking an injunction against the State's expenditure of funds to enforce the Carry Law's "place of worship" provision. The District Court dismissed Count 5 because Plaintiffs' claims on Counts 1 through 4 failed to state a claim for relief. Plaintiffs appealed the District Court's judgment dismissing the Amended Complaint, but their brief contains no argument that the court erred in dismissing Count 5. The appeal as to that count is accordingly abandoned. *United States v. Jernigan,* 341 F.3d 1273, 1283 n.8 (11th Cir. 2003) (considering an argument abandoned when "a party seeking to raise a claim or issue on appeal [fails to] plainly and prominently so indicate").

Federal Rule of Civil Procedure 12(b)(1)[11] on the grounds of Eleventh Amendment immunity[12] and Plaintiffs' lack of standing to sue, and under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim for relief. Upson County and the County Manager separately moved the court to dismiss the Amended Complaint under Rule 12(b)(1) for Plaintiffs's lack of standing, and under Rule 12(b)(6) because the Amended Complaint failed to state a claim for relief.

In addressing the defendants' motions, the District Court bypassed the question of whether Plaintiffs had standing to sue and went straight to the question of whether any of the counts of the Amended Complaint stated a claim for relief. The court found that none of the counts stated a claim, and therefore dismissed the respective counts on the merits. The court dismissed all counts against the State on the

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[11] Federal Rule of Civil Procedure 12(b)(1) permits a district court to dismiss for "lack of subject-matter jurisdiction."

[12] *See* U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *see also Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 100, 104 S. Ct. 900, 908, 79 L. Ed. 2d 67 (1984) ("This Court's decisions thus establish that 'an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.' " (quoting *Employees v. Missouri Public Health & Welfare Dep't,* 411 U.S. 279, 280, 93 S. Ct. 1614, 1616, 36 L. Ed. 2d 251 (1973))).

additional ground of Eleventh Amendment immunity.[13] Before we decide whether the District Court erred in dismissing the four counts of the Amended Complaint under Rule 12(b)(6), we must address an issue the District Court bypassed: whether Plaintiffs lacked standing to sue.[14] It is to that issue that we turn now.

II.

"The judicial Power [of the United States] shall extend to all Cases, in Law and Equity, arising under this Constitution." U.S. Const. art. III, § 2. To establish an Article III "case," *see Summers v. Earth Island Inst.,* 555 U.S. 488, 492-93, 129 S. Ct. 1142, 1148-49, 173 L. Ed. 2d 1 (2009) ("In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent

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[13] In addition to arguing that the District Court erred in dismissing their claims under Federal Rule of Civil Procedure 12(b)(6), Plaintiffs also challenge the court's dismissal of the claims against the State on the Eleventh Amendment ground. Because we conclude that none of the counts of the Amended Complaint states a claim for relief, we need not, and do not, address the Eleventh Amendment issue.

[14] *See Anago Franchising, Inc. v. Shaz, LLC,* 677 F.3d 1272, 1275 (11th Cir. 2012) ("We have an independent obligation to determine whether jurisdiction exists in each case before us, so we may consider questions of jurisdiction *sua sponte* even when, as here, the parties have not raised jurisdictional challenges." (citing *Arbaugh v. Y&H Corp.,* 546 U.S. 500, 514, 126 S. Ct. 1235, 1244, 163 L. Ed. 2d 1097 (2006))).

actual or imminently threatened injury to persons caused by private or official violation of law."), a plaintiff must establish standing, which requires a showing that

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-181, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992)). Case law from both the Supreme Court and this court is clear: because we must afford special protection for the exercise of constitutional rights, a plaintiff does not always need to risk prosecution to obtain preventative relief when his or her exercise of a constitutional right at stake. *See Steffel v. Thompson,* 415 U.S. 452, 459, 94 S. Ct. 1209, 1215, 39 L. Ed. 2d 505 (1974) ("[I]t is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights."); *Jacobs v. Florida Bar,* 50 F.3d 901, 904 (11th Cir. 1995) ("A plaintiff stating that he 'intends to engage in a specific course of conduct arguably affected with a constitutional interest . . .

does not have to expose himself to enforcement to be able to challenge the law.'" (quoting *ACLU v. Florida Bar,* 999 F.2d 1486, 1492 (11th Cir. 1993))). Instead, a plaintiff with the exercise of a constitutional right at stake may seek declaratory or injunctive relief prior to the challenged statute's enforcement. *See Ex Parte Young,* 209 U.S. 123, 150-51, 28 S. Ct. 441, 450, 52 L. Ed. 714 (1908) (concluding that state officials may be enjoined by a federal court of equity and that a federal court may, in appropriate circumstances, enjoin future state criminal prosecutions if the state officials threaten to enforce an unconstitutional statute).

The "injury" in this pre-enforcement context is the well-founded fear that comes with the risk of subjecting oneself to prosecution for engaging in allegedly protected activity. *Babbitt v. UFW,* 442 U.S. 289, 298-99, 99 S. Ct. 2301, 2309, 60 L. Ed. 2d 895 (1979) ("When plaintiffs 'do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible,' they do not allege a dispute susceptible to resolution by a federal court." (quoting *Younger v. Harris,* 401 U.S. 37, 42, 91 S. Ct. 746, 749, 27 L. Ed. 2d 669 (1971))); *see also Virginia v. Am. Booksellers Ass'n, Inc.,* 484 U.S. 383, 393, 108 S. Ct. 636, 643, 98 L. Ed. 2d 782 (1988) (finding that allegations were sufficient when plaintiffs alleged "actual and well-founded fear that the law will be enforced against them").

This court has held that a risk of prosecution is sufficient if the plaintiff alleges (1) that an actual threat of prosecution was made, (2) that prosecution is likely, or (3) that a credible threat of prosecution exists based on the circumstances. *See Jacobs,* 50 F.3d at 904. To show that a prosecution is likely or a credible threat exists, a plaintiff must show that there is "a realistic danger of sustaining direct injury as a result of the statute's operation or enforcement." *Am. Civil Liberties Union v. Florida Bar,* 999 F.2d 1486, 1492 (11th Cir. 1993) (quoting *Babbitt v. United Farm Workers Nat. Union,* 442 U.S. 289, 298, 99 S. Ct. 2301, 2308, 60 L. Ed. 2d 895 (1979)). We look to see "whether the plaintiff is seriously interested in disobeying, and the defendant seriously intent on enforcing the challenged measure." *Id.* at 1493 (quoting *Int'l Soc'y for Krishna Consciousness v. Eaves,* 601 F.2d 809, 818 (5th Cir. 1979)).

Although the Amended Complaint is lacking in many respects, we believe that Plaintiffs have alleged a credible threat of prosecution under the Carry Law sufficient to establish standing to bring a facial challenge. They are license holders who regularly attend services at a place of worship. Moreover, they "would like to carry a handgun in such place of worship for the protection of [their] family and [themselves], but [they are] in fear of arrest and prosecution." It thus seems clear that Plaintiffs are seriously interested in engaging in conduct that is arguably prohibited by the Carry Law and that could give rise to prosecution by state authorities. Nothing

in the defendants' answers suggests that the Carry Law will not be vigorously enforced. Therefore, we cannot say that there exists only a "speculative risk" of prosecution; rather, Plaintiffs appear to be subject to a legitimate threat that they will be prosecuted for activity that, they believe, is constitutionally protected. And if the court granted the relief that Plaintiffs seek, we would surely provide redress for the alleged constitutional infringement at issue.

III.

Having concluded that Plaintiffs have standing to prosecute their claims, we turn to the question of whether the District Court erred in dismissing Counts 1 and 2 of the Amended Complaint – the allegation that Plaintiffs' forced compliance with the Carry Law will infringe their right to the free exercise of their religion, in violation of the First Amendment.

A.

The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*[.]" U.S. Const. amend. I (emphasis added). The Free Exercise Clause of the First Amendment is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *See Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940). The protections afforded by the Free Exercise Clause

prevent the government from discriminating against the exercise of religious beliefs or conduct motivated by religious beliefs. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 532, 113 S. Ct. 2217, 2226, 124 L. Ed. 2d 472 (1993) ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.").

1.

Counts 1 and 2 allege that the Carry Law "interferes with the free exercise of religion by Plaintiffs by prohibiting them from engaging in activities in a place of worship when those activities are permitted throughout the state." Count 1, labeled a "direct action," purports to state a cause of action directly under the First Amendment. The Amended Complaint, however, does not cite the statutory source of the District Court's jurisdiction to entertain Count 1; nor does the District Court's order dismissing it. The District Court ruled on the merits of Count 1; thus, we assume that the court found jurisdiction under 28 U.S.C. § 1331, which gives the district courts "original jurisdiction of all civil actions arising under the Constitution . . . of the United States." The First Amendment does not explicitly create the cause of action Count 1 attempts to assert, and we are aware of no case holding that such cause of action is implied

when the relief a plaintiff seeks is plainly available through a mechanism created by Congress.[15] In light of this, the District Court did not err in dismissing Count 1 pursuant to Rule 12(b)(6) for failure to state a claim for relief.

Count 2 asserts a claim under 42 U.S.C. § 1983.[16] Once again, neither the Amended Complaint nor the District Court's order cites the source of the District Court's jurisdiction to consider the claim. Because the court addressed Count 2 on the merits, we assume that it found jurisdiction under § 1331 and 28 U.S.C. § 1343, which gives the District Courts "original jurisdiction of any civil action authorized by law to be commenced by any person . . . [t]o redress the deprivation, under color of any State law . . . of any right . . . secured by the Constitution of the United States." 28 U.S.C. § 1343.

Section 1983 gives a party who claims to have suffered the deprivation of a constitutional right at

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[15] Where a statute provides an adequate remedy, we will not imply a judicially created cause of action directly under the Constitution. *See Bush v. Lucas,* 462 U.S. 367, 390, 103 S. Ct. 2404, 2417, 76 L. Ed. 2d 648 (1983); *Schweiker v. Chilicky,* 487 U.S. 412, 414, 425, 108 S. Ct. 2460, 2468-69, 101 L. Ed. 2d 370 (1988); *see also Williams v. Bennett,* 689 F.2d 1370, 1390 (11th Cir. 1982).

[16] *See* 42 U.S.C. § 1983 ("Every person who . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.").

the hands of a person acting "under color of" state law "an action at law [or] suit in equity" against such person "for redress." 42 U.S.C. § 1983. In this case, the redress Plaintiffs seek is a declaration that the "place of worship" provision is unconstitutional on its face and as applied to them. The State of Georgia, however, is not a "person" subject to suit under § 1983. *See Will v. Michigan Dept. of State Police,* 491 U.S. 58, 65-66, 109 S. Ct. 2304, 2309, 105 L. Ed. 2d 45 (1989) (concluding that a State is not a "person" under § 1983). The District Court dismissed the State under the Eleventh Amendment, but could have dismissed it on the ground that it is not amenable to § 1983 liability. Upson County would be subject to § 1983 liability, though, if it caused through the enforcement of County policy the constitutional deprivation Plaintiffs say they would suffer, but the Amended Complaint fails to allege that their prosecution for refusing to comply with the Carry Law would be pursuant to County policy.[17] Hence, the District

[17] Municipalities can serve as a "person" for the purposes of a suit under § 1983. *See Monell v. Dep't of Social Servs.,* 436 U.S. 658, 690, 98 S. Ct. 2018, 2035-36, 56 L. Ed. 2d 611 (1978). To hold a municipality liable, however, a plaintiff must point to a policy of the municipality, the enforcement of which will infringe a constitutional right. *Bd. of Cnty. Comm'rs v. Brown,* 520 U.S. 397, 415, 117 S. Ct. 1382, 1394, 137 L. Ed. 2d 626 (1997) ("Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights."). Plaintiffs here have not done so. *See Cooper v. Dillon,* 403 F.3d 1208, 1221 (11th Cir. 2005) ("A policy is a decision that is officially adopted by the municipality, or created by an official of such rank that he or she could be said

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Court properly dismissed Count 2 against the County. The County Manager is amenable to § 1983 liability, but Count 2 contains no allegation of wrongdoing specific to him. Accordingly, the court did not err in dismissing Count 2 as to the Manager.

This brings us to the Governor. Part of the Governor's job is to ensure the enforcement of Georgia's statutes.[18] He is subject to suit under § 1983, and the District Court properly entertained Plaintiffs' Count 2 allegations against him. We now address the question of whether Count 2 states a claim for declaratory relief against the Governor sufficient to survive a motion to dismiss.

2.

To survive a motion to dismiss, a plaintiff must "plead factual matter that, if taken as true, states a claim" that is plausible on its face. *Ashcroft v. Iqbal,*

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to be acting on behalf of the municipality. . . . A custom is a practice that is so settled and permanent that it takes on the force of law." (quoting *Sewell v. Town of Lake Hamilton,* 117 F.3d 488, 489 (11th Cir. 1997))).

[18] Georgia law arguably endows the Governor with law enforcement authority, although other officials, who are charged specifically to enforce the law, would certainly be more appropriate defendants. *See Luckey v. Harris,* 860 F.2d 1012, 1016 (11th Cir. 1988) ("According to the Georgia constitution, the governor is responsible for law enforcement in that state and is charged with executing the laws faithfully." (citing Ga. Const. art. 5, § 2)).

556 U.S. 662, 666, 129 S. Ct. 1937, 1942-43, 173 L. Ed. 2d 868 (2009). This necessarily requires that a plaintiff include factual allegations for each essential element of his or her claim. *Randall v. Scott,* 610 F.3d 701, 707 n.2 (11th Cir. 2010) ("[C]omplaints . . . must now contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." (internal quotations omitted)); *Am. Dental Ass'n v. Cigna Corp.,* 605 F.3d 1283, 1289 (11th Cir. 2010) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007)).

Plaintiffs allege that the Carry Law "interferes with the free exercise of religion by Plaintiffs by prohibiting them from engaging in activities in a place of worship when those activities are generally permitted throughout the state." Am. Compl. at ¶¶ 39, 42. This so-called prohibition applies to anyone who enters a place of worship – regardless of the person's religious preference. Count 2 is styled as both a facial challenge, *see United States v. Salerno,* 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697 (1987) (holding that, to succeed on a facial challenge, a plaintiff must prove "that no set of circumstances exists under which the [statute] would be valid," or in other words, that the law is

unconstitutional in all of its applications."),[19] and an as-applied challenge.[20]

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[19] While *Salerno* is often criticized, its holding remains binding precedent, which we faithfully apply here. *See Gulf Power Co. v. United States,* 187 F.3d 1324, 1336 n.9 (11th Cir. 1999) (noting that three current or former Supreme Court Justices – retired Justice Souter, Justice Ginsburg, and retired Justice Stevens – have questioned *Salerno*'s "no set of circumstances" formulation of the facial challenge standard); *see also Fla. League of Prof'l Lobbyists, Inc. v. Meggs,* 87 F.3d 457, 459 (11th Cir. 1996) (discussing "how high the threshold for facial invalidation should be set" and recognizing the substantial disagreement among the Court over whether a facial challenge should require proof that a law is unconstitutional in all applications or merely most of its applications).

[20] The Amended Complaint does not state an as-applied challenge. Plaintiffs argue that the Carry Law, as applied to them, violates their constitutional rights, even though the Carry Law has not yet been applied to them. To us, this appears to be an inherent contradiction. *Compare Harris v. Mexican Specialty Foods, Inc.,* 564 F.3d 1301, 1308 (11th Cir. 2009) ("Because [an as-applied] challenge asserts that a statute cannot be constitutionally applied in particular circumstances, it necessarily requires the development of a factual record for the court to consider." (citing *Siegel v. LePore,* 234 F.3d 1163, 1171 (11th Cir. 2000))), with *Am. Charities for Reasonable Fundraising Reg., Inc. v. Pinellas County,* 221 F.3d 1211, 1214 (11th Cir. 2000) ("To establish their standing to bring an as-applied challenge [in the context of a pre-enforcement challenge], [p]laintiffs need to demonstrate that a 'credible threat of an injury exists,' not just a speculative threat which would be insufficient for Article III purposes." (quoting *Kirby v. Siegelman,* 195 F.3d 1285, 1290 (11th Cir. 1999)). Even taking the language in *American Charities* at face value – that somehow it is possible to bring an as-applied challenge in a pre-enforcement review of a statute that has yet to be applied – we believe that there are few situations where that type of challenge would prevail. Such a situation could arise

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We conclude that the Amended Complaint fails to state a Free Exercise Clause challenge because Plaintiffs omit any factual matter showing how the Carry Law burdens a sincerely held religious belief. Plaintiffs argue that such an allegation is unnecessary if a law is subject to strict scrutiny because it is not neutral or generally applicable.[21] The problem

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when the factual context of the challenge is so clear and uncontroverted that there is no question as to how the statute will be applied. If this is the case, a plaintiff's complaint must include all of the factual allegations necessary to clearly illustrate the context in which the statute will be applied, which Plaintiffs certainly failed to do here.

[21] As Plaintiffs correctly observe, the Supreme Court has identified two standards of review that are to be used, depending on the type of law at issue in a First Amendment challenge. If a law is one that is neutral and generally applicable, then rational basis scrutiny should be applied, requiring that the plaintiff show that there is not a legitimate government interest or that the law is not rationally related to protect that interest. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531, 113 S. Ct. 2217, 2226, 124 L. Ed. 2d 472 (1993) ("In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." (citing *Empl't Div., Dept. of Human Res. of Ore. v. Smith,* 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990)). If, however, a law is not neutral or generally applicable, either because the law is facially discriminatory or, alternatively, because "the object of [the] law is to infringe upon or restrict practices because of their religious motivation," then strict scrutiny is the proper framework, which would then require the State to show there is a compelling governmental interest and that the law is narrowly tailored. *See id.* at 531-32, 113 S. Ct. at

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with that argument is that it misconstrues clear, well-established First Amendment precedent from both the Supreme Court and this court.[22] Given that precedent, they have failed to state a plausible First Amendment claim.

2225 ("Neutrality and general applicability are interrelated, and, as becomes apparent in this case, failure to satisfy one requirement is a likely indication that the other has not been satisfied. A law failing to satisfy these requirements must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.").

[22] Plaintiffs consistently maintained, both before the District Court and this court, that they need not allege that a sincerely held religious belief was burdened in any way. Appellants' Br. at 15. In fact, before the District Court, Plaintiffs expressly denied that they were alleging any impact on their religious beliefs:

> Defendants insist that free exercise challenges must involve a statute that "impermissibly burden[s] one of [a plaintiff's] sincerely held religious beliefs." The cases that apply Defendants' argument involve laws that are neutral and of general applicability. Defendants admit their law is neither neutral nor generally applicable, but they have failed to cite a single case where a law that is not neutral toward religion required a showing of a burden on a sincerely held religious belief. In cases where the law at issue is not neutral, there is no burden test.

Pls. Resp. to Supplemental Br. Defs. State of Georgia and Gov. Sonny Perdue in Supp. of Defs. Mot. to Dismiss at 13-14; *see also* Pls. Br. Supp. Mot. Prelim. Inj. at 10 ("[I]t is true that Plaintiffs do not assert that their religious beliefs require them to carry guns to 'places of worship'[.]").

B.

1.

First Amendment Free Exercise Clause precedent is clear: a plaintiff must allege a constitutionally impermissible burden on a sincerely held religious belief to survive a motion to dismiss. This is so because, as a threshold issue – before a court even considers whether a law is subject to the rational basis test or, alternatively, strict scrutiny – a court must be able to determine that the protection of the Free Exercise Clause is triggered.[23]

The Supreme Court has reiterated time and time again that personal preferences and secular beliefs do not warrant the protection of the Free Exercise Clause. *See Frazee v. Illinois Dep't of Employment Sec.,* 489 U.S. 829, 833, 109 S. Ct. 1514, 1517, 103 L. Ed. 2d 914 (1989) ("There is no doubt that '[o]nly beliefs rooted in religion are protected by the Free Exercise Clause[.]' Purely secular views do not suffice." (quoting *Thomas v. Review Bd. of Ind. Emp't. Sec. Div.,* 450 U.S. 707, 713, 101 S. Ct. 1425, 1430, 67 L.Ed.2d 624 (1981))); *Wisconsin v. Yoder,* 406 U.S. 205, 215-216, 92 S. Ct. 1526, 1533, 32 L. Ed. 2d 15 (1972). Put another way, a complaint fails to state a Free Exercise claim if it does not allege that (1) the

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[23] We need not, and do not, decide whether the Carry Law is subject to strict scrutiny, as Plaintiffs suggest, or rational basis scrutiny. We merely conclude that even if strict scrutiny did apply to this challenge, Plaintiffs would not prevail.

plaintiff holds a belief, not a preference, that is sincerely held and religious in nature, not merely secular; and (2) the law at issue in some way impacts the plaintiff's ability to either hold that belief or act pursuant to that belief. *See Church of the Lukumi Babalu Aye,* 508 U.S. at 532, 113 S. Ct. at 2226 ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.").

Despite Plaintiffs' arguments to the contrary, the Supreme Court's *Church of the Lukumi Babalu*[24] decision reaffirms that to survive a motion to dismiss *all* Free Exercise Clause challenges must include allegations that the law at issue creates a constitutionally impermissible burden on a sincerely held religious belief.[25] This court has followed the Supreme

[24] In *Church of the Lukumi Babalu,* the Court, applying strict scrutiny, held that a city ordinance that prohibited the sacrifice of animals violated the Free Exercise Clause of petitioners who were members of a Santeria religion. *See Church of the Lukumi Babalu Aye,* 508 U.S. at 524, 113 S. Ct. at 2222. The Court found that the Santeria religion employs animal sacrifice as a principal form of devotion. *Id.* Because the ordinance had an impermissible object to burden the sincerely held religious beliefs of the Santeria religion, it violated the protections of the First Amendment. *Id.*

[25] We focus on the opinion's introduction to part II. In this introduction the Court concludes, "We must consider petitioners' First Amendment claim." *Church of the Lukumi Babalu Aye,* 508 U.S. at 531, 113 S. Ct. at 2226. This, in turn, leads us to ask another question: what threshold issues did the Supreme Court decide in order to reach its conclusion that the Free Exercise

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Clause was sufficiently implicated such that it needed to consider the petitioners' First Amendment claim? We start by quoting the introduction in its entirety:

> The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*. . . ." The city does not argue that Santeria is not a "religion" within the meaning of the First Amendment. Nor could it. Although the practice of animal sacrifice may seem abhorrent to some, "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." Given the historical association between animal sacrifice and religious worship, petitioners' assertion that animal sacrifice is an integral part of their religion "cannot be deemed bizarre or incredible." Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons. We must consider petitioners' First Amendment claim.

Id. at 531, 113 S. Ct. at 2225-26 (internal references omitted) (internal quotations omitted).

By deconstructing this paragraph sentence by sentence, we see that the Supreme Court engaged in exactly the analysis that Plaintiffs claim is inapposite to a law subject to strict scrutiny. The Court first cites the overarching rule at issue – the First Amendment. *Id.* ("The Free Exercise Clause of the First Amendment, which has been applied to the States through the Fourteenth Amendment, provides that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]' " (internal references omitted)). Next, the Court sets out that what is at issue is religious in nature, *id.* ("The city does not argue that Santeria is not a 'religion' within the meaning of the First Amendment. Nor could it."), and that there is a religious belief, not merely a preference at stake, *id.* ("Although the practice of animal sacrifice may seem abhorrent

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Court's lead, *see Watts v. Fla. Int'l Univ.,* 495 F.3d 1289, 1294 (11th Cir. 2007) (Carnes, J.) ("To plead a valid free exercise claim, [a plaintiff] must allege that the government has impermissibly burdened one of his 'sincerely held religious beliefs.'" (quoting *Frazee v. Ill. Dep't of Emp't Sec.,* 489 U.S. 829, 834, 109 S. Ct. 1514, 1517, 103 L. Ed. 2d 914 (1989))), and our sister circuits are in accord with our position.[26] With this

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to some, 'religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.'" (quoting *Thomas,* 450 U.S. at 714, 101 S. Ct. at 1430)). The Court then establishes that this religious belief is sincerely held. *Id.* ("Neither the city nor the courts below, moreover, have questioned the sincerity of petitioners' professed desire to conduct animal sacrifices for religious reasons."). Finally, the Court illustrates how the sincerely held religious belief at issue (animal sacrifice) is burdened by the governmental regulation (prohibiting animal sacrifice). *Id.* at 526-31, 113 S. Ct. at 2222-25 (explaining the Santeria religion and, in light of the conflict of these beliefs with the ordinances described by the court immediately preceding the introduction, turning to the merits of the First Amendment claim).

[26] *See Parker v. Hurley,* 514 F.3d 87, 99 (1st Cir. 2008) ("Even if [*Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990),] largely set aside in free exercise jurisprudence, at least in some contexts, 'the balancing question – whether the state's interest outweighs the plaintiff's interest in being free from interference,' it did not alter the standard constitutional threshold question. That question is 'whether the plaintiff's free exercise is interfered with at all.'" (citation omitted)); *Levitan v. Ashcroft,* 281 F.3d 1313, 1320 (D.C. Cir. 2002) ("[T]he First Amendment is implicated when a law or regulation imposes a . . . burden on the litigant's religious practice. Our cases make clear that this threshold showing must be made before the First Amendment is implicated.");

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pleading issue now clear, we turn to Plaintiffs' Amended Complaint.

2.

To be brief, the Amended Complaint fails to state a claim for relief under the First Amendment. *See Iqbal,* 556 U.S. at ___, 129 S. Ct. at 1949. We searched the Amended Complaint to no avail in an attempt to find factual allegations that could possibly be construed as alleging that the Carry Law imposes a constitutionally impermissible burden on one of Plaintiffs' sincerely held religious beliefs. At various points, Plaintiffs allege that they would like to carry a handgun in a place of worship for the protection either of themselves, their family, their flock, or other members of the Tabernacle. Plaintiffs conclude by alleging that the Carry Law interferes with their free exercise of religion by prohibiting them from engaging in activities in a place of worship when those activities are generally permitted throughout the State. That Plaintiffs "would like" to carry a firearm in order to be able to act in "self-defense" is a personal preference, motivated by a secular purpose. As we

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Bauchman ex rel. Bauchman v. W. High Sch., 132 F.3d 542, 557 (10th Cir. 1997) ("To state a claim for relief under the Free Exercise Clause, [a plaintiff] must allege something more than the fact the song lyrics and performance sites offended her personal religious beliefs. She must allege facts demonstrating the challenged action created a burden on the exercise of her religion.").

note *supra,* there is no First Amendment protection for personal preferences; nor is there protection for secular beliefs. *United States v. DeWitt,* 95 F.3d 1374, 1375 (8th Cir. 1996) ("Nevertheless, the Free Exercise Clause does not protect purely secular views or personal preferences." (citing *Frazee v. Ill. Dep't of Emp't Sec.,* 489 U.S. at 833, 109 S. Ct. at 1517)). The allegations in the Amended Complaint, as Plaintiffs chose to frame their case, do not state a Free Exercise claim.[27]

In sum, conclusory allegations that the Carry Law interferes with Plaintiffs' free exercise of religion are not sufficient to survive a motion to dismiss. Their Free Exercise claim is not plausible, *see Iqbal,*

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[27] After arguing before the District Court on numerous occasions that they did not have to allege a constitutionally impermissible burden on a sincerely held religious belief, Plaintiffs chose to include additional facts with their motion for summary judgment. These additional facts do not appear in the Amended Complaint. It is well-settled in this circuit that a plaintiff may not amend the complaint through argument at the summary judgment phase of proceedings. *See Gilmour v. Gates, McDonald & Co.,* 382 F.3d 1312, 1315 (11th Cir. 2004) (per curiam) ("A plaintiff may not amend [his or her] complaint through argument in a brief opposing summary judgment."); *see also Hurlbert v. St. Mary's Health Care Sys., Inc.,* 439 F.3d 1286, 1297 (11th Cir. 2006) ("At the summary judgment stage, the proper procedure for plaintiffs to assert a new claim is to amend the complaint in accordance with Fed. R. Civ. P. 15(a)." (quoting *Gilmour,* 382 F.3d at 1315)).

556 U.S. ___, 129 S. Ct. at 1949, and the District Court correctly dismissed it.[28]

IV.

We now consider Plaintiffs' Second Amendment claims, in Counts 3 and 4, that the Carry Law infringed on their right to bear arms. The Second Amendment reads, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Supreme Court drastically changed the impact of the Second Amendment in the wake of two of its recent decisions: *District of Columbia v. Heller*[29] and *McDonald v. City of Chicago.*[30]

In *Heller,* the Court held for the first time that the Second Amendment "codified a pre-existing" individual right to keep and bear arms. 554 U.S. at 592, 128 S. Ct. at 2797. In so holding, the Court struck down a prohibition of the possession of

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[28] The District Court addressed, and dismissed, the Tabernacle's claim that the Carry Law impermissibly encroaches on its ability to manage its internal affairs. The Tabernacle failed to include in its brief on appeal an argument that the District Court erred in dismissing the claim. We therefore consider that argument abandoned.

[29] 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

[30] ___ U.S. ___, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).

operable handguns in one's home.[31] The Court reached its holding after an extensive discussion of the background of the Second Amendment at the time of drafting, reasoning that, while "self-defense had little to do with *codification*; it was the *central component* of the right itself." *Id.* at 599, 128 S.Ct. at 2801 (emphasis in original). The Court concluded that the District of Columbia's ban made it impossible to use a handgun for the "core lawful purpose of self-defense." *Id.* at 630, 128 S.Ct. at 2818. The Court went to great lengths to emphasize the special place that the home – an individual's private property – occupies in our society. *See Heller,* 554 U.S. at 628-29, 128 S.Ct. at 2817-18 (emphasizing that "the need for defense of self, family, and property is most acute" in the home and emphasizing the special role of handguns as "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family" (internal quotation marks omitted)). *McDonald* made the "Second Amendment binding on the States and their subdivisions," through the Due Process Clause

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[31] The District of Columbia Code provision at issue in *Heller* prohibited handgun possession in two ways: the District of Columbia (1) required the registration of all firearms and prohibited the registration of handguns, and (2) enacted a ban on keeping an operable firearm – the law stated that a firearm must be kept "unloaded and disassembled or bound by a trigger lock or similar device." *Heller,* 554 U.S. at 630, 128 S. Ct. at 2818.

of the Fourteenth Amendment. *See McDonald,* 130 S.Ct. at 3046.[32]

In Counts 3 and 4 Plaintiffs allege that "[the Carry Law] infringes on the rights of Plaintiffs to keep and bear arms, in violation of the Second Amendment, by prohibiting them from possessing weapons in a place of worship." Am. Compl. at ¶¶ 45,

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[32] Plaintiffs must establish that there is some type of state action at issue. The state action in this case is the enactment of the Carry Law and that statute's enforcement through the arrest, criminal prosecution, and conviction of an individual. See *Hines v. Davidowitz,* 312 U.S. 52, 80, 61 S. Ct. 399, 411, 85 L. Ed. 581 (1941) ("The Fourteenth Amendment guarantees the civil liberties of aliens as well as of citizens against infringement by state action in the enactment of laws and their administration as well."). A property owner who engages in self-help is not a state actor. *See Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 157, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978) (concluding that a private party's actions can be treated as state action only when the function performed is "traditionally exclusively reserved to the State" (internal quotation marks omitted)); *White v. Scrivner Corp.,* 594 F.2d 140, 142 (5th Cir. 1979) (denying that private security personnel were acting under the color of state law in "detaining [plaintiffs] as suspected shoplifters, in searching their purses, and in detaining them after the gun was found, even though the defendants no longer had any reason to believe they were shoplifting" because the court reasoned that "[a] merchant's detention of persons suspected of stealing store property simply is not an action exclusively associated with the state. *Experience teaches that the prime responsibility for protection of personal property remains with the individual.*" (emphasis added)). In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

48. As with their First Amendment claims, Plaintiffs brought both a "direct action," in Count 3, and a § 1983 action, in Count 4. Many of the same pleading deficiencies of the Amended Complaint that we found in Plaintiffs' First Amendment claims (Counts 1 and 2) also plague their Second Amendment claims (Counts 3 and 4); we need not reiterate those problems.[33] Our inquiry boils down to whether Plaintiffs' § 1983 claim entitles them to declaratory relief against the Governor.

Plaintiffs frame their Second Amendment attack as both a facial and an as-applied challenge in a pre-enforcement review. We view the Second Amendment challenge as essentially raising only a facial challenge.[34] As we stated with respect to Plaintiffs' Free

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[33] For a review of these deficiencies, see the introduction to part III, *supra*.

[34] We believe that the Amended Complaint fails to plead an as-applied Second Amendment challenge for the same reason we rejected the as-applied First Amendment challenge. The Carry Law has not been applied to Plaintiffs, and they have not included sufficient allegations to show how the Carry Law would be applied in their specific case. *See supra* note 20; *Harris v. Mexican Specialty Foods, Inc.,* 564 F.3d 1301, 1308 (11th Cir. 2009) ("'An as-applied challenge . . . addresses whether 'a statute is unconstitutional on the facts of a particular case or to a particular party.' Because such a challenge asserts that a statute cannot be constitutionally applied in particular circumstances, it necessarily requires the development of a factual record for the court to consider."). As a result, we view Plaintiffs as challenging the Carry Law as void on its face only.

Like our sister circuits, we believe a two-step inquiry is appropriate: first, we ask if the restricted activity is protected by

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Exercise claim, Plaintiffs must show that the Carry Law is unconstitutional in all applications to prevail in their facial challenge. *See United States v. Salerno,* 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987). One common application of the Carry Law would be when a license holder wants to carry a firearm in a place of worship where management of the place of worship prohibits carrying. To state a facial challenge, therefore, Plaintiffs must take the

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the Second Amendment in the first place; and then, if necessary, we would apply the appropriate level of scrutiny. *See Heller v. District of Columbia,* 670 F.3d 1244, 1252 (D.C. Cir. 2011) (adopting two-step inquiry); *Ezell v. City of Chicago,* 651 F.3d 684, 701-04 (7th Cir. 2011) (noting that "the threshold inquiry in some Second Amendment cases will be a 'scope' question: Is the restricted activity protected by the Second Amendment in the first place," and then moving to a second step, if necessary, applying the appropriate level of scrutiny); *United States v. Chester,* 628 F.3d 673, 680 (4th Cir. 2010) (noting that "a two-part approach to Second Amendment claims seems appropriate under *Heller,*" requiring first a determination that the law at issue imposes a burden on conduct falling within the scope of the Second Amendment, and then applying the requisite level of scrutiny); *United States v. Reese,* 627 F.3d 792, 800-01 (10th Cir. 2010) (adopting a similar two-step analytical framework); *United States v. Marzzarella,* 614 F.3d 85, 89 (3d Cir. 2010) (adopting a two-pronged approach where "[f]irst, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If it does not, our inquiry is complete. If it does, we evaluate the law under some form of means-end scrutiny."). In this case, we need only reach the first step. In reaching this conclusion, we obviously need not, and do not, decide what level of scrutiny should be applied, nor do we decide whether a place of worship is a "sensitive place" under *Heller,* 554 U.S. at 626, 128 S. Ct. at 2817.

position that the Second Amendment protects a right to bring a firearm on the private property of another against the wishes of the owner. Put another way, Plaintiffs must argue that the individual right protected by the Second Amendment, in light of *Heller* and *McDonald,* trumps a private property owner's right to exclusively control who, and under what circumstances, is allowed on his or her own premises.[35] In short, we read Plaintiffs' claim to assume the following: management of a place of worship is likely to bar license holders from carrying an unsecured firearm on the premises; the license holders are unlikely to comply with management's instructions; management is likely to report such conduct to law enforcement; the license holders are likely to be arrested by for their refusal to comply with management's instructions; and the arrest establishes a Second Amendment violation.[36]

Heller commands that, in passing on a Second Amendment claim, courts must read the challenged statute in light of the historical background of the Second Amendment. *See* 554 U.S. at 592, 128 S. Ct. at

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[35] There is nothing in the record that would allow us to draw a conclusion that the Tabernacle is anything other than a purely private religious organization that owns property in its non-profit corporation legal form. We proceed under this assumption.

[36] The plain language of the Carry Law belies any argument that all firearms are per se prohibited from a place of worship; quite simply, this is not the "ban" that Plaintiffs make it out to be. Appellants' Br. at 14.

2797 ("We look to [the historical background of the Second Amendment] because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" (emphasis omitted)). Because a place of worship is *private property,* not public property, it is particularly important that we understand the individual right to bear arms in light of the historical background of criminal law, tort law, and property law; for that body of law establishes the rights of *private* property owners. In subpart A, we describe this historical background. In subpart B, we identify the scope of any pre-existing right to bear arms on the private property of another.

A.

We begin our review by describing the historical background of the Second Amendment.

In the *Commentaries on the Laws of England,* William Blackstone described a private property owner's right to exclusive control over his or her own property as a "sacred and inviolable right[ ]." 1 William Blackstone, Commentaries *140. Blackstone wrote,

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that

> sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.

2 *id.* *2. Blackstone also discussed how a license holder who enters private property does not have the same rights as a property owner. *See id.* (emphasizing that the right of a property owner is in "total exclusion of the right of any other individual in the universe"). In other words, a guest is able to enter or stay on private property only with the owner's permission. A guest is removable at the owner's discretion.[37]

Turning to common law tort principles, if a person enters upon the land of another without the owner's permission or if a person remains on the land against the owner's wishes, then the person becomes

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[37] As a matter of reference, it is worth pointing out that Georgia adopted this position. Since at least the nineteenth century, Georgia courts have expressly recognized that property owners possess a right to exclude others from one's private land. *See Fluker v. Ga. R.R. & Banking Co.,* 8 S.E. 529, 530 (Ga. 1889) (noting that "the very nature of property involves a right of exclusive dominion over it in the owner"); *see also Navajo Constr. v. Brigham,* 608 S.E.2d 732, 733 (Ga. App. 2004) (stating that a private property owner "has the right 'to possess, use, enjoy, and dispose of it, and the corresponding right to exclude others from [its] use' " (quoting *Woodside v. City of Atlanta,* 103 S.E.2d 108, 115 (Ga. 1958)). These principles are reflected in the Carry Law. *See* O.C.G.A. § 16-11-127(c) (noting that "private property owners or persons in legal control of property through a lease, rental agreement, licensing agreement, contract, or any other agreement to control access to such property" may forbid the possession of a weapon).

a trespasser. At common law, this status implicated the law of torts – allowing the owner to initiate a civil action against the trespasser. *See* 2 Frederick Pollock & Frederic William Maitland, *The History of English Law* 41 (Legal Classic Library special ed. 1982) (2d ed. 1899) (noting that one should look to "the law of crimes" and "the law of torts and civil injuries").[38] Blackstone elaborated on the private wrong of trespass:

> But in the limited and confined sense, in which we are at present to consider [the wrong of trespass], it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of *meum* and *tuum,* or property, in lands being once established, it follows as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil: every entry therefore

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[38] *Prosser* and *Keeton* similarly embraces the exclusive right of a property owner:

> The possessor of land has a legally protected interest in the exclusiveness of his possession. In general, no one has any right to enter without his consent, and he is free to fix the terms on which that consent will be given. Intruders who come without his permission have no right to demand that he provide them with a safe place to trespass, or that he protect them in their wrongful use of his property.

W. Page Keeton et al., *Prosser and Keeton on Torts* § 58, at 393 (5th ed. 1984).

> thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression.

3 William Blackstone, Commentaries *209.[39] Implied in this private action, as Blackstone explained it, is

[39] We also note that *an owner* may be subject to civil liability for their failure to protect guests from harm. For example, depending on the place of worship's knowledge of particular risks posed by a license holder, the place of worship may be subject to tort liability if it fails to take sufficient precautions to ensure that the other worshipers in attendance are not endangered. The movement to impose liability on land owners – and thereby give some legal rights, even if minimal, to persons entering another's land – slowly gained steam both in England and in the United States throughout the seventeenth, eighteenth, and early nineteenth centuries. *See* 2 Edward Coke, Institutes of the Laws of England *316 (recognizing, in treatises first published from 1628 to 1644, that a tort action could lie against a landowner who used excessive force to repel a trespasser); *see also Townsend v. Wathen,* (1808) 103 Eng. Rep. 579 (K.B.) (recognizing that a landowner who set a trap that injured an entrant's animal on his or her property could be held liable); *Bird v. Holbrook,* (1828) 130 Eng. Rep. 911 (C.P.) (holding that an owner who left a spring gun to injure a trespasser could be held liable). The common law eventually evolved into a three-tiered framework: individuals were classified as either an invitee, a licensee, or a trespasser. The landowner owed a duty that corresponded to the individual's classification. Over time, some states have moved away from these common law rules; it is safe to say, though, that currently all states impose certain duties on a property owner (or its lessee). Georgia courts have consistently held that a private property owner owes a duty of care to those on its property pursuant to an "express or implied invitation" and to "licensees," *see* O.C.G.A. §§ 51-3-1 to 51-3-2, and that this duty includes a legal obligation to protect such persons from the foreseeable dangers posed by *other* invitees or licensees. *See Moon v. Homeowners' Ass'n of Sibley Forest, Inc.,*

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an exclusive right of an owner to eject an individual from the owner's property and initiate a civil trespass action.[40]

In addition, criminal law principles drawn from the common law reinforce the fundamental nature of a property owner's rights. In *The History of English Law,* Frederick Pollock and Frederic William Maitland note:

> In the first place, the protection given to possession may be merely a provision for the better maintenance of peace and quiet. It is a prohibition of self-help in the interest of public order. The possessor is protected, not on account of any merits of his, but because the peace must be kept; to allow men to make forcible entries on land or to seize goods without form of law, is to invite violence.

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415 S.E.2d 654, 657 (Ga. App. 1992) ("'An owner of premises is liable to a guest . . . when the owner has reason to anticipate the misconduct of the guest inflicting the injury.'" (alteration in original) (quoting *Veterans Org. of Fort Oglethorpe v. Potter,* 141 S.E.2d 230, 233 (Ga. App. 1965))).

[40] Likewise, Georgia has long recognized a private action for trespass. *See* O.C.G.A. § 51-9-1 ("The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie."); *Neal v. Haygood,* 1 Kelly 514, 1846 WL 1205 at *2 (Ga. 1846) ("Where the cause of action is a *tort,* or arises, *ex delicto,* supposed to be by force and against the king's peace, then the action dies; as battery, false imprisonment, trespass, words, &c., *escape against the sheriff,* and many others of the same kind." (internal quotation marks omitted)).

2 Pollock & Maitland, *supra,* at 41. Blackstone reiterates this position, describing trespass as an "offence against the public peace." 4 William Blackstone, Commentaries *147 (emphasis added). The criminal offense of trespass, as set forth in several ancient statutes, included "any forcible entry, or forcible detainer after peaceable entry, into any lands." *Id.* Pollock and Maitland offer a similar view: "[T]here will be a trespass with force and arms if a man's body, goods or land have been unlawfully touched." 2 Pollock & Maitland, *supra,* at 526.[41]

B.

Thus, property law, tort law, and criminal law provide the canvas on which our Founding Fathers drafted the Second Amendment. A clear grasp of this background illustrates that the pre-existing right

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[41] We note that Georgia has adopted these common law principles as cornerstone tenets of its criminal code. To wit, the Georgia Code provides that

> A person commits the offense of criminal trespass when he or she knowingly and without authority:
>
> > (1) Enters upon the land or premises of another person . . . for an unlawful purpose; [or]
> >
> > . . .
> >
> > (3) Remains upon the land or premises of another person . . . after receiving notice from the owner, rightful occupant, or, upon proper identification, an authorized representative of the owner or rightful occupant to depart.

O.C.G.A. § 16-7-21(b)(3).

codified in the Second Amendment does not include protection for a right to carry a firearm in a place of worship against the owner's wishes. Quite simply, there is no constitutional infirmity when a private property owner exercises his, her, or its – in the case of a place of worship – right to control who may enter, and whether that invited guest can be armed, and the State vindicates that right. This situation, being a likely application of the Carry Law, illustrates that Plaintiffs cannot show that all or most applications of the Carry Law are unconstitutional. *See United States v. Salerno,* 481 U.S. 739, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987).

A place of worship's right, rooted in the common law, to forbid possession of firearms on its property is entirely consistent with the Second Amendment. Surely, given the Court's pronouncement that the Second Amendment merely "codified a pre-existing right," Plaintiffs cannot contend that the Second Amendment in any way abrogated the well established property law, tort law, and criminal law that embodies a private property owner's exclusive right to be king of his own castle. By codifying a pre-existing right, the Second Amendment did not expand, extend, or enlarge the individual right to bear arms at the expense of other fundamental rights; rather, the Second Amendment merely preserved the status quo of the right that existed at the time.[42]

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[42] We acknowledge that certain colonies, including Georgia, enacted laws requiring the possession of firearms in a place of

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Indeed, numerous colonial leaders, as well as scholars whose work influenced the Founding Fathers, embraced the concept that a man's (or woman's) right to control his (or her) own private property occupied a special role in American society and in our freedom. *See* William Tudor, *Life of James Otis* 66-67 (1823) (quoting a speech from 1761 given by James Otis, who stated that "one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle."); John Locke, *Two Treatises on Government,* 209-10 (1821) ("[Property] being by him removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men.").

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worship at one point or another. The Georgia statute read as follows: "WHEREAS it is necessary for the security and defence of this province from internal dangers and insurrections, that all persons resorting to places of worship shall be obliged to carry fire arms." 19 Allen D. Candler, *The Colonial Records of the State of Georgia* 137-140 (1910). Based on the language of Georgia's statute, the primary motivation for requiring attendance at a place of worship with a firearm was likely a practical one; that is, the colonial government identified a time when much of the community would be gathered in one location – each Sunday at a place of worship for services – to ensure that individuals both possessed the equipment necessary for defense and kept it in a state of readiness should their services be called upon to defend the community against an internal or external threat. That a statute such as this one appeared on the books of several colonies at various times does not indicate that the Second Amendment enshrined a constitutional right to preempt the wishes of a place of worship in order to carry unsecured firearms in contravention of an owner's wishes.

An individual's right to bear arms as enshrined in the Second Amendment, whatever its full scope, certainly must be limited by the equally fundamental right of a private property owner to exercise exclusive dominion and control over its land. The Founding Fathers placed the right to private property upon the highest of pedestals, standing side by side with the right to personal security that underscores the Second Amendment. As Blackstone observed,

> [T]hese [fundamental rights] may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty; and the right of private property: because as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

1 William Blackstone, Commentaries *129.

Blackstone talks not of sacrificing one of the "principal or primary" rights for another, but rather of "preservation of *these,* inviolate." *Id.* (emphasis added). He concludes that all of the three fundamental rights of personal security, personal liberty, and private property can, and must, coexist together to fully protect civil liberties. *Id.* It is simply beyond rational dispute that the Founding Fathers, through the Constitution and the Bill of Rights, sought to

protect the fundamental right of private property, not to eviscerate it. *See* John Adams, Defence of the Constitutions of Government of the United States (1787), *reprinted in* 6 John Adams, *The Works of John Adams,* 3, 9 (Charles Francis Adams ed., 1851) ("The moment the idea is admitted into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence."); James Madison, Property (1792), *reprinted in* 6 *The Writings of James Madison* 101, 102 (Gaillard Hunt ed., 1906) ("Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government which *impartially* secures to every man whatever is his own." (emphasis in original)); Thomas Paine, Essay dated December 23, 1776, *reprinted in* Thomas Paine, *The Crisis* 8 (2009 ed.) (1776) ("[I]f a thief breaks into my house, burns and destroys my property, and kills or threatens to kill me, or those that are in it, and to 'bind me in all cases whatsoever' to his absolute will, am I to suffer it? What signifies it to me, whether he who does it is a king or a common man; my countryman or not my countryman; whether it be done by an individual villain, or an army of them? If we reason to the root of things we shall find no difference; neither can any just cause be assigned why we should punish in the one case and pardon in the other.").

Plaintiffs, in essence, ask us to turn *Heller* on its head by interpreting the Second Amendment to destroy one cornerstone of liberty – the right to enjoy one's private property – in order to expand another – the right to bear arms. This we will not do. If, as Blackstone argues, our concept of civil liberties depends on a three-legged stool of rights – personal security, personal liberty, and private property – it would be unwise indeed to cut off one leg entirely only to slightly augment another. Rather, our task is to read the Second Amendment's pre-existing right alongside the equally important rights protected by the Constitution in order to strengthen all three legs and thereby better secure the foundation of our liberty. When the Second Amendment is understood in its proper historical context, it becomes readily apparent that the Amendment codified a pre-existing right that was circumscribed by the common law rights of an owner under property law, tort law, and criminal law. *Heller*'s expounding of the pre-existing right enshrined in the Second Amendment does nothing to change this.

In sum, to the extent Plaintiffs' argument implies that the Second Amendment – in light of the Court's decisions in *Heller* and *McDonald* – somehow abrogates the right of a *private* property owner – here, a place of worship – to determine for itself whether to allow firearms on its premises and, if so, under what circumstances, the argument badly misses the mark. We conclude that the Second Amendment does not give an individual a right to carry a firearm on a

place of worship's premises against the owner's wishes because such right did not pre-exist the Amendment's adoption. Enforcing the Carry Law against a license holder who carries a firearm on private property against the owner's instructions would therefore be constitutional. Plaintiffs' facial challenge fails because the Carry Law is capable of numerous constitutional applications. *See Salerno,* 481 U.S. at 745, 107 S. Ct. at 2100.

V.

For the foregoing reasons, we AFFIRM the District Court's Rule 12(b)(6) dismissal of Counts 1 through 4 of the Amended Complaint.

SO ORDERED.

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

GEORGIACARRY.ORG, INC., THE BAPTIST TABERNACLE OF THOMASTON, GEORGIA, INC., EDWARD STONE, and JONATHAN WILKINS, **Plaintiffs,** **v.** **THE STATE OF GEORGIA, UPSON COUNTY, GEORGIA, GOV. SONNY PERDUE, in his official capacity as Governor of The State of Georgia, and KYLE HOOD, in his official capacity as County Manager for Upson County, Georgia,** **Defendants.**	:	**Civil Action No. 5:10-CV-302 (CAR)**

ORDER ON DEFENDANTS' MOTIONS TO DISMISS

(Filed Jan. 24, 2011)

In this action, Plaintiffs GeorgiaCarry.Org, Inc. ("GCO"), The Baptist Tabernacle of Thomaston, Georgia, Inc. ("Tabernacle"), Edward Stone, and Jonathan Wilkins seek a ruling on the constitutionality of a provision of Georgia's firearm laws regulating the possession of weapons in a place of worship. Currently

pending before the Court are motions to dismiss filed by: Defendants Governor Sonny Perdue and the State of Georgia [Doc. 9], Defendant Upson County, Georgia [Doc. 15], and Defendant Kyle Hood [Doc. 24]. Earlier in this action, the Court conducted a hearing on a request for a preliminary injunction. The Court denied Plaintiffs' request for a preliminary injunction against enforcing the law [Doc. 14]. At that hearing, the Court also notified the parties that they were free to file supplementary briefs on the pending motions. Plaintiffs responded by filing their supplemental brief styled as a motion for summary judgment [Doc. 20]. Defendants Governor Perdue and the State of Georgia filed a supplemental brief in support of their earlier motion to dismiss [Doc. 21].

Having carefully considered the parties' briefs and the relevant case law, the Court determines that Plaintiffs have failed to state a claim for relief. Accordingly, Defendants' motions to dismiss [Docs. 9, 15, 24] are **GRANTED.** Plaintiffs' motion for summary judgment is **DENIED** as moot.

I. BACKGROUND

The Plaintiffs' well pleaded factual allegations are as follows.

On June 4, 2010, Governor Sonny Perdue signed into law Senate Bill 308, which contained various amendments to Georgia's firearms laws. In particular, the bill amended O.C.G.A. § 16-11-127, which at that time prohibited the carrying of firearms at a

"public gathering." In pertinent part, O.C.G.A. § 16-11-127 now provides that:

> A person shall be guilty of carrying a weapon or long gun 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). A weapon, for purposes of section 16-11-127, is defined as a knife or handgun. *Id.* § 16-11-125.1.

Plaintiff GeorgiaCarry.Org, Inc., is a non-profit corporation organized under the laws of the State of Georgia. Its primary mission is to foster the rights of its members to keep and bear arms. Most of GCO's members possess valid Georgia Weapons Licenses issued pursuant to O.C.G.A. § 16-11-129.

Plaintiff Edward Stone is the former President of GCO and a current member of its board of directors. Stone has a valid Georgia Weapons License. Stone regularly attends worship services. While attending services, he would like to carry a firearm to defend himself and his family, but he alleges that he fears arrest and prosecution under O.C.G.A. § 16-11-127 for doing so.

Plaintiff Baptist Tabernacle of Thomaston, Georgia, Inc., is a non-profit corporation organized under the laws of the state of Georgia. The Tabernacle is a religious institution and owns real property in Thomaston, Georgia, where it conducts religious worship services. The Tabernacle would like to allow certain members with valid Georgia Weapons Licenses to carry firearms on Tabernacle property, but alleges that it fears its members will be arrested and prosecuted for doing so.

Plaintiff Jonathan Wilkins is the CEO and pastor of the Tabernacle. He is also a member of GCO and has a valid Georgia Weapons License. He regularly conducts worship services on Tabernacle property and would like to carry a weapon to defend himself, his family, and his congregation while doing so. He also has an office in the Tabernacle building and is frequently the only occupant of the building. He would like to keep a firearm in his office for self-defense, but he alleges that he fears being prosecuted for carrying a firearm while conducting services or keeping one in his office.

Plaintiffs filed this action against the following Defendants: the State of Georgia; Upson County, Georgia; Governor Sonny Perdue, in his official capacity as Governor of Georgia; and Kyle Hood, in his official capacity as County Manager for Upson County. In this action, Plaintiffs allege that O.C.G.A. § 16-11-127(b)(4) violates their First Amendment right to the free exercise of religion and their Second Amendment right to keep and bear arms. The Plaintiffs seek declaratory relief in the form of a ruling that the statute is unconstitutional both on its face and as applied to them and an injunction prohibiting enforcement of the statute.

II. LEGAL STANDARD

In considering dismissal of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a district court must accept the allegations set forth

in the complaint as true and construe facts in the light most favorable to the plaintiff. *See Kirby v. Siegelman,* 195 F.3d 1285, 1289 (11th Cir.1999) (per curiam). Mere conclusory allegations, however, are not entitled to be assumed as true upon a motion to dismiss. *Ashcroft v. Iqbal,* ___ U.S. ___, 129 S. Ct. 1937, 1951 (2009). The Supreme Court requires that "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face,'" which requires that the plaintiff plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1949 (internal citations omitted). This plausibility standard is not a probability requirement but demands "more than a sheer possibility that a defendant has acted unlawfully." *Id.*

III. FIRST AMENDMENT CHALLENGE

Plaintiffs first argue that the statute violates their free exercise rights because it imposes an impermissible burden on their ability to attend or conduct worship services by prohibiting them from carrying a firearm on their person for self defense while doing so. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. amend. I. That guarantee was made applicable to the States in *Cantwell v. Connecticut,* 310 U.S. 296 (1940).

Plaintiffs contend that the statute violates the Free Exercise Clause by forcing otherwise licensed congregants to give up the right to carry a gun while attending or conducting worship services. "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. Int'l Univ.,* 495 F.3d 1289, 1294 (11th Cir. 2007) (internal quotation marks omitted). In this case, neither individual plaintiff alleges that his religious beliefs require him to carry a firearm into a place of worship. Nor does the Tabernacle allege that its members' religious beliefs require that any member carry a firearm into the Tabernacle, whether during worship services or otherwise. Instead, Plaintiffs assert that attending worship services is a sincere religious belief that has been impermissibly burdened by the statute's requirements.

Before inquiring into the burden imposed on Plaintiffs' religious beliefs, the Court notes the regulation of firearm possession continues to be an important governmental interest. *See District of Columbia v. Heller,* 128 S. Ct. 2783, 2816-2817, 2822 (noting the importance of the "variety of tools for combating th[e] problem [of handgun violence], including some measures regulation handguns").

The question then is whether the alleged burden on Plaintiffs' ability to attend worship services constitutes a burden sufficient to state a free exercise violation. It is beyond doubt that the First Amendment prohibits the government from regulating religious

beliefs. *Employment Div., Dep't of Human Res. of Or. v. Smith,* 494 U.S. 872, 877 (1990). It is also clear that the First Amendment protects not only religious beliefs, but the performance of or abstention from conduct, such as assembling with others for worship or proselytizing. *Id.* Although not confronted by the question in *Smith,* the Supreme Court opined that laws banning such acts when engaged in for religious reasons "would doubtless be unconstitutional." *Id.*

The law at issue here, however, does not prohibit anyone from attending services at a place of worship. Instead, any burden on attending worship services is attenuated and tangential because the law only requires that persons either not carry a weapon to a place of worship, leave their weapons secured in their vehicles, or notify security or management personnel of the presence of the weapon and follow directions for removing, securing, storing, or temporarily surrendering the weapon. *See* O.C.G.A. § 16-11-127(d)(2),(3).

Although the Supreme Court's Free Exercise Clause jurisprudence has been muddled at times, the consistent theme is that laws imposing substantial burdens on religious practices trigger the heightened scrutiny of a free exercise claim. *See Sherbert v. Varner,* 374 U.S. 398, 406 (1963). Thus, the Supreme Court has invalidated laws that prohibited plaintiffs from engaging in conduct that their religious beliefs required. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993) (law banning animal sacrifice, which was a principal form of devotion for the Santeria religion). The Court has also

exempted plaintiffs from the operation of laws that would require plaintiffs to engage in conduct that their religious beliefs proscribed in order to earn a livelihood. *See Thomas v. Review Bd. of Ind. Employment Sec. Div.,* 450 U.S. 707 (1981) (claimant denied unemployment compensation after terminating his job because of religious belief that prohibited participation in the production of weapons); *Sherbert v. Verner,* 374 U.S. 398 (1963) (Seventh-day Adventist denied unemployment benefits because she refused to work on Saturday). Even though the burdens on religious belief in *Thomas* or *Sherbert* were more indirect – in that plaintiffs were not compelled to engage in conduct prohibited by their religious beliefs by a direct criminal sanction – the pressure those laws exerted on plaintiffs to "forego" their religious practices was "unmistakable." 374 U.S. at 404.

The substantial burden requirement also appears in statutory protections of the free exercise right. The Religious Freedom Restoration Act (RFRA)[1] and the Religious Land Use and Institutionalized Persons Act (RLUIPA)[2] both provide protection against laws that place a substantial burden on religious exercise. 42 U.S.C. §§ 2000bb, 2000cc. While neither statute is

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[1] RFRA was passed to restore the *Sherbert* approach after the Supreme Court's decision in *Smith.* 42 U.S.C. § 2000bb(b).

[2] RLUIPA was passed in response to the Supreme Court's holding in *City of Boerne v. Flores,* 521 U.S. 507 (1997), that RFRA was not applicable to the States. *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1229 (11th Cir. 2004).

directly at issue in this case, the free exercise ideals embodied in them are still instructive. In the context of RLUIPA, the Eleventh Circuit has explained that a substantial burden is more than a mere inconvenience, but instead "is akin to a significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1227 (11th Cir. 2004). Although the Eleventh Circuit's explication of a "substantial burden" for purposes of RLUIPA does not strictly control what constitutes a sufficient burden under the Free Exercise Clause, the Court finds the idea expressed there persuasive because free exercise cases informed the Eleventh Circuit's understanding. *See id.* at 1226 ("The Supreme Court's definition of "substantial burden" within its free exercise cases is instructive in determining what Congress understood "substantial burden" to mean in RLUIPA.").

Bearing those principles in mind, the Court finds that the law at issue here does not pressure religious conduct enough to constitute a substantial burden to trigger scrutiny under the Free Exercise Clause. No criminal sanctions forbid Plaintiffs from attending a place of worship. The law does not force them to decide between attending worship services or supporting themselves and their families. Instead, Plaintiffs only risk criminal sanction if they refuse to comply with the law's mandates about carrying firearms in a place of worship, an activity they do not attach to any sincere religious belief. The burden of complying with

the law's requirements does not prohibit them from attending worship services, nor does it place an "unmistakable" pressure on them "to forego religious precepts." *Sherbert,* 374 U.S. at 404; *Midrash Sephardi,* 366 F.3d at 1227. Accordingly, the Court concludes that any burden posed by the law is too insubstantial and too attenuated to any of Plaintiffs' sincere religious beliefs to state a claim under the Free Exercise Clause.

In addition to the claim that the statute impermissibly burdens attendance at worship services, the Tabernacle raises the additional claim that the statute encroaches on its ability to manage its internal affairs. The Eleventh Circuit has observed that government action can burden the free exercise of religion " 'by encroaching on the ability of a church to manage its internal affairs.' " *Gellington v. Christian Methodist Episcopal Church, Inc.,* 203 F.3d 1299, 1303 (11th Cir. 2000) (quoting *EEOC v. Catholic University of America,* 83 F.3d 455, 460 (D.C. Cir. 1996)). That observation arose in the context of describing the operation of the ministerial exception to the application of Title VII. The ministerial exception was first articulated in *McClure v. Salvation Army,* 460 F.2d 553, 560 (5th Cir. 1972), when the Fifth Circuit concluded that "the application of the provisions of Title VII to the employment relationship existing between . . . a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First

Amendment." Accordingly, the court held that Title VII did not apply to the employment relationship between a church and minister. Thus, the exception primarily functions to exempt religious organizations from the operation of otherwise applicable laws such as Title VII or the ADEA in employment discrimination cases brought by those performing certain ministerial functions.[3] The exception was founded, however, on a broader principle that "there exists 'a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Id.* (quoting *Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 116, 73 S. Ct. 143, 154 (1952) (alterations omitted)).

As the quotation from *Kedroff* makes clear, the free exercise principles underlying the ministerial exception are only implicated when the state interferes with matters of church government, faith, or doctrine. The law at issue here does not touch on such ecclesiastical matters. The Tabernacle does not allege that the safety concerns or security protocols of a place of worship involve issues of religious faith or doctrine, as opposed to purely secular issues. Consequently, the law in this case does not encroach on the

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[3] The precise scope of the exception in regards to what positions or functions are sufficiently "ministerial" is not altogether clear. That question, however, is immaterial to this case.

Tabernacle's ability to manage its internal affairs in a way that violates the First Amendment.

For the foregoing reasons, the Court concludes that Plaintiffs have failed to state a claim for relief under the Free Exercise Clause of the First Amendment.[4]

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[4] Although Plaintiffs purport to bring both a facial and an as-applied challenge to the statute, they do little to distinguish between the two. Having determined that the statute is not unconstitutional as applied to the religious beliefs in the Plaintiffs' allegations, the Court also finds that the statute does not violate the First Amendment on its face.

A party ordinarily "can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the [law] would be valid,' i.e., that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 449 (2008) (quoting *United States v. Salerno,* 481 U.S. 739, 745 (1987)). Plaintiffs have clearly failed to establish that no set of circumstances exists under which the statute is valid because the statute is in fact valid as applied to their professed religious beliefs.

In the First Amendment free speech context, the Supreme Court has recognized another type of facial challenge "under which a law may be overturned as impermissibly overbroad because a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 449 n.6 (quotation marks omitted). Even assuming an overbreadth challenge is available here, Plaintiffs have not demonstrated that a substantial number of instances exist in which the statute cannot be constitutionally applied.

IV. SECOND AMENDMENT

Plaintiffs also contend that the statute impermissibly burdens their right to keep and bear arms secured by the Second Amendment. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. In determining whether the statute impermissibly decision in *District of Columbia v. Heller,* 128 S. Ct. 2783 (2008), is the appropriate starting point.[5]

A. *Heller*

In *Heller,* the Supreme Court held that several D.C. statutes, which taken together amounted to a total ban on possessing a handgun in the home, violated the Second Amendment. Employing a textual and historical analysis of the Second Amendment, the

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[5] In *McDonald v. City of Chicago,* ___ U.S. ___, 130 S. Ct. 3020 (2010), the Court took up the question of whether the Second Amendment applied only against the federal government or against the States as well. Although disagreeing on the proper reasoning, a majority of the Court concluded that the Second Amendment right recognized in *Heller* was fully applicable to the States by way of the Fourteenth Amendment. *Id.* at 3050 (plurality opinion); *id.* at 3088 (Thomas, J., concurring). Although *McDonald* is important to this case in that it makes clear that the right recognized in the Second Amendment applies against the States, it adds little to the content of the Second Amendment right beyond what is found in *Heller.* Accordingly, the Court will draw primarily from *Heller* in discussing the Second Amendment right.

Court identified the Second Amendment as guaranteeing an "individual right to possess and carry weapons in case of confrontation." *Id.* at 2797. The Court went on to describe "the inherent right of self-defense" as "central to the Second Amendment right." *Id.* at 2817. The Court then declared that the statutes at issue in the case, which "amount[ed] to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose" and "extend[ed] . . . to the home, where the need for defense of self, family, and property is most acute," would fail at any level of scrutiny applied to assess the validity of limitations of enumerated constitutional rights. *Id.* at 2817-18. Having reached that conclusion, the Court held that the District's ban on possessing a handgun in the home violated the Second Amendment. *Id.* at 2821-22.

Although an "individual right to possess and carry weapons in case of confrontation" in support of "the inherent right of self-defense" seems quite broad, the Court carefully noted that "the right secured by the Second Amendment is not unlimited." *Id.* at 2816. Historically, the right had never been viewed as "a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* Unfortunately, the Court declined to "undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment." *Id.*

The Court did, however, offer some thoughts on the impact of its ruling on existing regulations. Particularly, the Court noted 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. The Court identified these "presumptively lawful regulatory measures" as examples and not an exhaustive list. *Id.* at 2817 n.26.

B. Analytical Framework

With those principles in mind, the Court turns to whether this state law passes constitutional muster. Unfortunately, *Heller* does not explicitly answer the question. The Supreme Court recognized that the Second Amendment protects a right to possess and carry weapons for self defense; however, given the "severe" nature of the law in that case, the only conduct that the Court clearly located within the Second Amendment right was the possession and carrying of a handgun by an otherwise qualified person within his home for self-defense. *Id.* at 2811, 2821-22.

As an initial matter, the Court notes that Defendants have not argued that the scope of the Second Amendment is limited to possession of a firearm within the home. Thus, the Court will proceed on the assumption that the right is not so limited. Having made that assumption, the Court must determine the proper mode of analysis to follow. *Heller* provides little guidance in this regard as well. Thus, before

answering that question, the Court will briefly survey approaches followed by other courts faced with Second Amendment challenges.

The Seventh Circuit suggests an approach that focuses primarily on whether the law satisfies an appropriate means-ends scrutiny. *United States v. Skoien,* 614 F.3d 638 (7th Cir. 2010) (en banc). *Skoien* presented a challenge to 18 U.S.C. § 922(g)(9), which prohibits the possession of a firearm by anyone convicted of a misdemeanor crime of domestic violence. Looking at both the holding of *Heller* and its list of presumptively lawful regulations, the Seventh Circuit, sitting en banc, noted that neither "contained an answer to the question whether [18 U.S.C.] § 922(g)(9) is valid." *Id.* at 640. The court eschewed the historical inquiry undertaken in the panel opinion[6] and instead took from *Heller* that although the Supreme Court had not established that any particular statute was valid, statutory "exclusions need not mirror limits that were on the books in 1791." *Id.* at 641. Thus, the court accepted that "some categorical disqualifications are permissible," but declined to ground those disqualifications in an historical basis. *Id.* at 641.

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[6] The panel opinion had focused first on whether the conduct burdened by the law at issue fell within the scope of the Second Amendment right as publicly understood at the time of the ratification of the Bill of Rights. *United States v. Skoien,* 587 F.3d 803, 809 (7th Cir. 2009), *rev'd by,* 614 F.3d 638 (7th Cir. 2010) (en banc).

Accepting that categorical limits on the possession of firearms could be permissible, the court turned to the appropriate showing to justify such a limitation. It concluded that a rational-basis test was not appropriate, and instead put the government to the burden of making a "strong showing." *Id.* at 641-42. Employing an intermediate scrutiny standard, the court concluded that "logic and data establish a substantial relationship between § 922(g)(9)" and the objective of preventing armed mayhem. *Id.* at 642. Finally, the court refused to entertain the question of whether § 922(g)(9) would be constitutional as applied to a misdemeanant who had been law abiding for an extended period of time because Skoien had been convicted of domestic battery twice and was arrested for possessing multiple guns just one year after his second conviction. *Id.* at 645.

The Third Circuit suggests a two-pronged approach focusing first on the scope of the Second Amendment protection and second on whether the challenged law passes means-ends scrutiny. *United States v. Marzzarella,* 614 F.3d 85, 89 (3d Cir. 2010).[7] In attempting to define the scope of the Second Amendment, the *Marzzarella* court turned to the list of presumptively lawful regulatory measures. The court noted that it was unclear whether the measures were presumptively lawful because they fell outside

[7] The Fourth Circuit, drawing from *Marzzarella,* recently adopted a similar approach in *United States v. Chester,* ___ F.3d ___, 2010 WL 5396069 (4th Cir. Dec. 30, 2010).

the scope of conduct protected by the Second Amendment or because they would survive under the appropriate standard of scrutiny. *Id.* at 91. Reasoning that the *Heller* opinion had equated the list of presumptively lawful regulatory measures with restrictions on dangerous and unusual weapons, the court concluded that the presumptively lawful regulatory measures were best understood as "exceptions to the Second Amendment guarantee." *Id.* The court further noted that the list was not exhaustive; thus, "the Second Amendment appears to leave intact additional classes of restrictions." *Id.* at 92-93. But the court counseled caution in "extend[ing] these recognized exceptions to novel regulations unmentioned in *Heller,*" because *Heller* does not make clear the proper analytical approach for identifying additional restrictions. *Id.* at 93.

Turning to the law at issue in *Marzzarella,* 18 U.S.C. § 922(k), which prohibits the possession of weapons with obliterated serial numbers, the Third Circuit concluded that although the law may have been similar to those banning dangerous or unusual weapons, the safer approach was to assume that § 922(k) burdened protected conduct and to evaluate the law under means-ends scrutiny. *Id.* at 95. Finding that the law was properly characterized as regulating the manner of the exercise of Second Amendment rights, as opposed to limiting, the court concluded

that intermediate scrutiny was appropriate and that the law satisfied that standard. *Id.* at 97-99.[8]

Other courts have taken less rigorous approaches than those outlined above. In cases involving regulations found on *Heller*'s presumptively lawful list of prohibitions, many courts have simply pointed to the list as a source of categorical exclusions and upheld the application of the law in that case. *See United States v. Rozier,* 598 F.3d 768, 771 (11th Cir. 2010) (upholding application of prohibition on possession by a felon in 18 U.S.C. § 922(g)(1)); *United States v. Vongxay,* 594 F.3d 1111, 1115 (9th Cir. 2010) (same); *United States v. McCane,* 573 F.3d 1037 (10th Cir. 2009) (same).

Following the *Skoien* en banc opinion, however, the Seventh Circuit has applied a more rigorous approach even to regulations on the list. Noting that regulations on the list were only "presumptively lawful," the court required the government to prove that applying 18 U.S.C. § 922(g)(1)[9] to the defendant satisfied a "strong showing" in the form of an intermediate scrutiny standard. *United States v. Williams,* 616 F.3d 685, 692-94 (7th Cir. 2010). Although the government satisfied its burden in that case, the

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[8] The court also held that the law would pass strict scrutiny as well. *Marzzarella,* 614 F.3d at 99-101.

[9] Section 922(g)(1), the felon in possession statute, prohibits the possession of a firearm by anyone convicted of a crime punishable by imprisonment for a term exceeding one year. 18 U.S.C. § 922(g)(1).

Seventh Circuit entertained the idea that in other cases, the government might not be able to prove that the application of § 922(g)(1) met that "strong showing." *Id.* at 693.

In cases in which the regulation at issue was similar to one found on *Heller*'s list, but not on the list itself, courts have followed a wider variety of approaches. In some cases, courts have analogized the challenged regulation to regulations on the list, but declined to subject the law to any further independent scrutiny. Analyzing 18 U.S.C. § 922(g)(9)'s prohibition against firearm possession by persons convicted of the misdemeanor crime of domestic violence, the Eleventh Circuit phrased the issue before it as "whether the statutory prohibition against the possession of firearms by persons convicted of the misdemeanor crime of domestic violence . . . warrants inclusion on *Heller*'s list of presumptively lawful longstanding prohibitions." *United States v. White,* 593 F.3d 1199, 1205 (11th Cir. 2010). The court noted that, unlike a conviction under § 922(g)(1), a conviction under § 922(g)(9) required prior violent conduct on the part of the defendant and that § 922(g)(9) was passed in order to address the "dangerous loophole" that resulted when domestic abusers were not ultimately charged and convicted of a felony. *Id.* at 1205-06 (internal quotation marks omitted). Thus, the court reasoned that § 922(g)(9) deserved a place on the "list of longstanding prohibitions on which *Heller* does not cast doubt." *Id.* at 1206. Having reached that conclusion, the court then upheld the law in that case

without subjecting it to any independent means-ends scrutiny.[10] *Id.*

Other courts have hedged their bets on the proper mode of analysis by both analyzing the challenged law in light of the list of presumptively lawful measures and subjecting it to independent means-ends scrutiny. *See United States v. Walker,* 709 F. Supp. 2d 460, 464-67 (E.D. Va. 2010) (analyzing 18 U.S.C. § 922(g)(9) both by reference to the presumptively lawful regulations and against intermediate scrutiny); *United States v. Luedtke,* 589 F. Supp. 2d 1018, 1021-25 (E.D. Wis. 2008) (analyzing 18 U.S.C. § 922(g)(8) primarily by analogy method but briefly concluding it would survive strict scrutiny as well); *United States v. Booker,* 570 F. Supp. 2d 161, 163-64 (D. Me. 2008) (noting that a "useful approach is to ask whether a statutory prohibition against the possession of firearms by felons and the mentally ill is similar enough to the statutory prohibition against the possession of firearms by persons convicted of the misdemeanor crime of domestic violence to justify its inclusion in the list of 'longstanding prohibitions' that survive Second Amendment scrutiny," but still

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[10] Other courts have employed this same approach. *See United States v. Seay,* 620 F.3d 919, 925 (8th Cir. 2010) (analyzing 18 U.S.C. § 922(g)(3)); *United States v. Richard,* 350 Fed. Appx. 252, 260 (10th Cir. 2009) (same); *United States v. Gillman,* No. 2:09-CR-896, 2010 WL 2598398, at *3 (D. Utah June 24, 2010) (analyzing 18 U.S.C. § 922(g)(8)); *United States v. Yanez-Vasquez,* No. 09-40056-01-SAC, 2010 WL 411112, at *4 (D. Kan. Jan. 28, 2010) (analyzing 18 U.S.C. § 922(g)(5)).

evaluating 18 U.S.C. § 922(g)(9) in terms "the critical nature of the governmental interest, and the definitional tailoring of the statute").

C. Application to Georgia's Law

Having surveyed the approaches followed by other courts, the Court turns now to the law at issue in this case. Drawing from the discussion in *Marzzarella* and in light of the Eleventh Circuit's focus on the list of presumptively lawful regulatory measures in *White* and *Rozier,* the Court finds it appropriate to first inquire whether the conduct burdened by this law simply lies beyond the protections of the Second Amendment.[11] Defendants argue, based on the *Heller* list of presumptively lawful regulatory measures, that the conduct burdened by this law lies beyond the Second Amendment. That list includes laws prohibiting carrying a firearm in "sensitive places such as schools and government buildings." *Heller,* 128 S. Ct. at 2816. In *Heller,* the Supreme Court did nothing more to elucidate exactly what constitutes a "sensitive place." Notwithstanding that, however, the list still indicates that categorical exclusions on carrying firearms in certain places may be permissible and that the list is not limited to schools or government buildings.

[11] The Court notes that Defendants have offered little evidence or argument for the proposition that the possession of a firearm specifically in a place of worship was outside the protections of the Second Amendment as an historical matter.

The trend in the Eleventh Circuit has been to subject the challenged regulation to no further means-ends scrutiny if it falls on the *Heller* list or is easily linked to a regulation on the list, *see Rozier,* 598 F.3d at 771; *White,* 593 F.3d at 1205. Given, however, that the Supreme Court did not indicate why a certain place might be considered "sensitive" for purposes of prohibiting firearms, the Court is hesitant to accept that whatever "sensitive" might mean, it must include places of worship. *See United States v. Dorosan,* 350 Fed. Appx. 874, 875-76 (5th Cir. 2009) (positing that a parking lot belonging to the USPS was a sensitive place); *United States v. Masciandaro,* 648 F. Supp. 2d 779, 790 (E.D. Va. 2009) ("Although *Heller* does not define 'sensitive places,' the examples given – schools and government buildings – plainly suggest that motor vehicles on National Park land fall within any sensible definition of a 'sensitive place.'"). Schools and government buildings do not immediately suggest any unifying theme or greater purpose that would go unserved if places of worship were not included, nor have Defendants suggested one.[12] Given the indeterminacy of what the Supreme Court intended to capture with the term "sensitive places," the Court finds that the better analytical approach is to lay aside the *Heller* list for the moment,

[12] Defendants do attempt to explain why all the locations found in O.C.G.A. § 16-11-127(b) might be considered "sensitive" in some sense. The question that Defendants fail to answer, however, is what the Supreme Court meant by "sensitive" in *Heller.*

to assume that Georgia's law burdens conduct within the scope of the Second Amendment, and to test whether the State can make the necessary showing to demonstrate that categorically prohibiting the possession of firearms in places of worship is permissible. *See Marzzarella,* 614 F.3d at 93-95.

Having adopted that approach, the question then becomes what level of scrutiny to apply in a means-ends analysis. In *Heller,* the majority eschewed the use of a rational basis test. *Heller,* 128 S. Ct. at 2818 n.27 ("If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect."). The majority also rejected an "'interest-balancing' approach" suggested by Justice Breyer in dissent. *Id.* at 2821. *Heller* having ruled out rational basis and an interest balancing approach, courts have been left to choose between strict and intermediate scrutiny. Most have chosen intermediate scrutiny. *See Heller v. District of Columbia,* 698 F. Supp. 2d 179, 185-86 (D.D.C. 2010) (collecting cases applying strict scrutiny, intermediate scrutiny, or an undue burden test).

This Court joins the majority of other courts and concludes that intermediate scrutiny is the appropriate standard of scrutiny for this case. Two considerations support this result. First, as others – including the *Heller* dissent – have suggested, the Supreme Court's description of a list of presumptively lawful regulatory measures is at least implicitly inconsistent

with strict scrutiny. *See, e.g., Heller,* 128 S. Ct. at 2851 (Breyer, J., dissenting) (noting that "the majority implicitly, and appropriately, reject[ed]" a strict scrutiny standard through its list of presumptively lawful regulatory measures); *Heller,* 698 F. Supp. 2d at 187 (noting that "the *Heller* dissent and numerous other courts and legal scholars" have concluded that "a strict scrutiny standard of review would not square with the majority's references to 'presumptively lawful regulatory measures' "). Second, the burden imposed by this law falls at least one level outside the core right recognized in *Heller* for a law abiding individual to keep and carry a firearm for the purpose of self defense in the home. Although Plaintiffs here are otherwise qualified and allege that they intend to carry their firearms for the purpose of self defense, the law does not impact their ability to do so in their homes.[13]

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[13] In their supplemental brief, styled as a motion for summary judgment, Plaintiffs, for the first time, advance the allegation that the statute prohibits Plaintiff Wilkins, who lives in a Tabernacle-supplied parsonage and often holds Tabernacle meetings there, from carrying a gun in his home. The Court declines to consider the constitutional implications of that allegation. Instead, it concludes that the statute does not prohibit Plaintiff Wilkins from carrying a firearm in his residence.

The statute does not define place of worship. Defendants suggest that a place of worship describes the entire building in which a religious congregation meets, as opposed to attempting to distinguish between a chapel or a secretary's office in a church building. Plaintiffs do not dispute that definition. The other places listed in subsection (b) all naturally encompass the entirety of a

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Under an intermediate scrutiny standard, a regulation "may be upheld so long as it is substantially related to an important governmental objective." *Nat'l Parks Conservation Ass'n v. Norton,* 324 F.3d 1229, 1244 (11th Cir. 2003) (internal quotation marks omitted). The fit between the government's objective and regulation need not be "necessarily perfect, but reasonable"; the government need "not necessarily [employ] the least restrictive means." *Bd. of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480 (1989).

Defendants advance three interests in support of the statute: 1) an interest in deterring and punishing violent crime, 2) an interest in deterring and

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building, and when the statute wishes to define only a portion of a building as constituting a covered location, it does so. *See* O.C.G.A. § 16-11-127(a)(3)(C). Thus, the Court agrees that the entire building in which a religious congregation meets is an appropriate definition for a place of worship for purposes of this case.

While certainly not undertaking to explore the full scope of buildings or structures that would fall under that definition, the Court readily concludes that Plaintiff Wilkins's residence does not. Plaintiffs do not allege that the primary purpose of this parsonage is anything but a residence. More particularly, they do not allege that the purpose of this parsonage is to host the worship services of a religious congregation. The parsonage does not transform into a place of worship simply because church matters might be discussed within its walls or because attendees at those meeting might engage in prayer. The Court leaves for another day the interpretational and constitutional questions that might be posed by a plaintiff who actually lives in a building that functions primarily as a meeting place for religious congregations.

punishing crime directed at "sensitive places"[14] – such as places of worship, government buildings, courthouses, and polling places, and 3) an interest in protecting the free exercise of religion.

Defendants' first proffered reason has been a popular one in many recent Second Amendment challenges to the provisions found in 18 U.S.C. § 922(g). No one disputes that the government's interest in preventing crime is not only important, but compelling. *See United States v. Salerno,* 481 U.S. 739, 750 (1987). Section 922(g) attempts to meet that goal by prohibiting the possession of firearms by different groups that present an increased risk for criminal or violent behavior. *See* 18 U.S.C. § 922(g) (prohibiting firearm possession by: felons, fugitives from justice, unlawful users or persons addicted to a controlled substance, persons committed to a mental institution, persons convicted of a misdemeanor crime of domestic violence). The fit between the legislative means and ends is necessarily tighter when the law seeks to prevent crime by targeting those groups demonstrably more likely to commit criminal or violent behavior for firearm dispossession.

Although the importance of the government interest in preventing crime is clear, the fit between the legislative means of prohibiting the carrying of a firearm by a license holder in a place of worship and the

[14] Defendants' decision to describe these locations as "sensitive places" is an attempt to link them to the *Heller* list.

end of preventing crime is less clear. In this case Defendants have not demonstrated that places of worship are either targets or locations of frequent criminal activity such that prohibiting the possession of firearms there would achieve the tighter fit demonstrated by the prohibitions in section 922(g). If, however, one accepts that restricting access to firearms aids in crime prevention, then prohibiting the carrying of firearms in any particular place will have some relationship to the aim of preventing crime. Presumably that is what Defendants are getting at when they argue that 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." [Doc 9-1 at 19.] That reasoning may be sufficient to meet a rational basis test, but whether it demonstrates the sort of substantial relationship required by intermediate scrutiny is not certain. Because Defendants have advanced other interests, however, the Court need not decide whether the general crime prevention interest standing alone is sufficient to sustain the challenged law.

Defendants' third objective, protecting the free exercise of religion, is an important governmental interest. The free exercise right is enshrined in the First Amendment to our Constitution. Although the Constitution protects a person's right to free exercise only against governmental intrusion, it is clear that the protection of religious freedom against private bias or coercion is also an important governmental

goal. *See, e.g.,* 42 U.S.C. § 2000e-2(a) (prohibiting discrimination in employment on the basis of religion). Prohibiting the carrying of firearms in a place of worship bears a substantial relationship to that important goal by protecting attendees from the fear or threat of intimidation or armed attack.[15]

Having concluded that the statute passes intermediate scrutiny, the Court turns briefly again to *Heller*'s list of presumptively lawful measures. Included on that list are "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." *Heller,* 128 S. Ct. at 2817. The Third Circuit, in *Marzzarella,* suggests that this list is best thought of as exceptions to the Second Amendment guarantee. The Eleventh Circuit's analysis of sections 922(g)(1) and 922(g)(9) in *Rozier* and *White* indicate similar thinking. Following that reasoning, if a place of worship were a "sensitive place," then regulations on the possession of firearms at places of worship would be excepted from the Second Amendment guarantee.

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[15] As applied to this case, Defendants' second objective, protecting individuals at sensitive locations, is only a generalization of their more specific third objective. They assert, in their second objective, that the State has an interest in protecting individuals at various locations deemed sensitive for one reason or another. Only their third objective, however, gives any content as to why they view places of worship as sensitive locations. In light of Defendants' explanation for why the State has a heightened interest in places of worship, the Court agrees that Defendants' second objective is an important one and that the statute bears a substantial relation to that goal.

The problem with that approach, as previously discussed, lies in the indeterminacy of what the Supreme Court intended to capture with the term "sensitive places." Defendants suggest that a place might be considered sensitive for any number of reasons. Certainly true. A place, such as a school, might be considered sensitive because of the people found there. Other places, such as government buildings, might be considered sensitive because of the activities that take place there. A reasonable argument can be made that places of worship are also sensitive places because of the activities that occur there. Indeed, the prior intermediate scrutiny analysis suggests as much. In the absence of clearer guidance as to what the Supreme Court meant to capture within the net of "sensitive places"; however, the Court concludes that the safer approach for now is the one taken – assuming that possession at a place of worship is within the Second Amendment guarantee and applying intermediate scrutiny.

Because the statute survives intermediate scrutiny, the Court concludes that it does not violate the Second Amendment as applied to Plaintiffs' allegations. As with their First Amendment challenge, Plaintiffs have done little to differentiate between their purported as-applied and facial challenges. Again, however, the Court finds that Plaintiffs' facial challenge based on the Second Amendment must fail as well. As before, Plaintiffs have failed to demonstrate that no set of circumstances exists under which the law would be valid because the law does not

violate the Second Amendment as applied to them. Moreover, again assuming that an overbreadth challenge is available under the Second Amendment – and there is ample reason to believe it may not be – Plaintiffs have not demonstrated that a substantial number of its applications are unconstitutional relative to its legitimate sweep. Indeed, challengers possessing valid Georgia Weapons Licenses and wishing to carry a handgun for self defense probably represent the most likely challengers of this statute. If the statute is constitutional as applied to them, then plainly it is not overbroad.

Before concluding the Second Amendment analysis, the Court will also briefly address Plaintiff Wilkins's contention that the statute is unconstitutional because it prevents him from keeping a firearm in his office at the Tabernacle. As with the home worship question, the Court does not reach the issue of whether such application of the statute would be unconstitutional because the statute does not prohibit Plaintiff Wilkins from keeping a firearm in his office at the church.

Although the statute generally prohibits persons with valid Georgia Weapons Licenses from carrying a firearm in a place of worship, the statute also provides that the prohibition on carrying in the unauthorized locations listed in subsection (b) does not apply to, *inter alia,* "a license holder who approaches security or management personnel upon arrival . . . and notifies such security or management personnel of the presence of the weapon . . . and explicitly

follows the security of management personnel's direction for removing, securing, storing, or temporarily surrendering such weapon." O.C.G.A. § 16-11-127(d)(2). As a result, the statute would allow Wilkins to keep a firearm in his office if he obtained permission from security or management personnel of the Tabernacle and kept it secured or stored as directed. If management or security personnel at the Tabernacle, which presumably includes Wilkins as CEO, did not grant him permission to secure or store a firearm in his office, then that would be at their discretion. Plaintiffs do not argue, however, that they possess a constitutional right to carry a firearm onto private property against the wishes of the owner or controller of the property.

For the foregoing reasons, the Court concludes that even accepting the Plaintiffs' well-pleaded allegations as true, they have failed to state a claim for relief under the Second Amendment.

V. State of Georgia's Immunity

The State of Georgia also contends that it must be dismissed as a party because it is immune from suit. In response, Plaintiffs contend that the State waived its Eleventh Amendment immunity by removing this case to federal court.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against

> one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. Although the language of the amendment does not contemplate suits brought against a state by its own citizens, the Supreme Court has recognized that "a federal court could not entertain a suit brought by a citizen against his own State." *Pennhurst State School & Hosp. v. Halderman,* 465 U.S. 89, 98 (1984). That immunity may be waived, but "in 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." *Id.* at 100. "This jurisdictional bar applies regardless of the nature of the relief sought." *Id.*; *see also Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 58 (1996) ("[W]e have often made it clear that the relief sought by a plaintiff suing a State is irrelevant to the question whether the suit is barred by the Eleventh Amendment.").

Plaintiffs argue that the State has waived its Eleventh Amendment immunity by removing this case to federal court. For that proposition, Plaintiffs cite *Lapides v. Board of Regents of the University System of Georgia,* 535 U.S. 613 (2002), in which the Supreme Court decided the question of whether a state waives its Eleventh Amendment immunity by its affirmative litigation conduct when it removes a case to federal court. The precise question before the Court, however, was whether the State waived its Eleventh Amendment immunity against litigating in

a federal forum by removing a case based on state law claims for which it had explicitly waived its immunity in state-court proceedings. *Id.* at 617 ("It has become clear that we must limit our answer to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings."). The Court specifically declined to "address the scope of waiver by removal in a situation where the State's underlying sovereign immunity from suit has not been waived or abrogated in state court." *Id.* at 617-18. Ultimately, the Court concluded removal of the case by the State waived its Eleventh Amendment immunity to litigating those state-law claims in a federal forum. *Id.* at 624.

The State contends that *Lapides* only stands for the proposition that a state waives its Eleventh Amendment immunity against litigating in a federal forum by removing a case, but that it may still assert its sovereign immunity against the claims at issue if it retained that immunity in state court as well. The Eleventh Circuit has yet to decide whether the reasoning of *Lapides* indicates that a state waives its sovereign immunity against claims for which it would still enjoy immunity in state court by removing the case to federal court. In analyzing *Lapides,* however, this Court has concluded that "consent to litigation in a federal forum does not . . . necessarily entail a waiver of a State's sovereign immunity from suit under its own state laws." *Coates v. Natale,* 2010 WL 749630, *10 (M.D. Ga. Mar. 1, 2010). Thus, "[e]ven if [a State] has consented to suit in a federal forum, [it]

maintains its inherent immunity from suit under its own laws." *Id.*

In this case, the State of Georgia does not seek to invoke its Eleventh Amendment immunity against litigating in a federal forum. Instead, it invokes its sovereign immunity against the claims that it contends it could invoke in state court as well. The Georgia Constitution provides that "sovereign immunity extends to the state and all of its departments and agencies," and that "sovereign immunity can only be waived by an Act of the General Assembly." Ga. Const. 1983, Art. I, § 2, Para. 9(e). It goes on to state that "[n]o waiver of sovereign immunity under this Paragraph shall be construed as a waiver of any immunity provided to the state . . . by the United States Constitution." *Id.* Art. I, § 2, Para. 9(f). Plaintiffs do not cite any statutory waiver of sovereign immunity to the claims at issue in this case.

Plaintiffs only support for their contention that the State has waived its sovereign immunity to these claims is a citation to *In Interest of A.V.B.,* 482 S.E.2d 275 (Ga. 1997). There, the Georgia Supreme Court stated that "[s]overeign immunity does not protect the state when it acts illegally and a party seeks only injunctive relief." *Id.* at 276 (citing *International Business Machines, Corp. v. Evans,* 453 S.E.2d 706 (Ga. 1995)). The claims in that case, however, were not based on a violation of a federal constitutional right. Indeed, in *Evans,* the Georgia Supreme Court observed that it was not deciding "whether sovereign immunity would bar a suit [seeking injunctive relief]

based on the alleged violation of a constitutional right." 453 S.E.2d at 709 n.3.

Accordingly, the Court concludes that Plaintiffs have failed to demonstrate the State has waived its sovereign immunity, as a matter of state law, against the claims presented in this case. Although the State may have waived its immunity against litigation in a federal forum by removing this case, its underlying sovereign immunity against the claims presented remains. Thus, the State of Georgia is immune from suit and must be **DISMISSED** as a defendant.

VI. CONCLUSION

Plaintiffs' allegations fail to state a claim for relief either under the First Amendment or the Second Amendment. The State of Georgia also enjoys immunity from the claims raised in this case; thus, it must be dismissed as a defendant. Accordingly, Defendants' motions to dismiss are **GRANTED.** Plaintiffs' motion for summary judgment in **DENIED** as moot.

SO ORDERED this 24th day of January, 2011.

S/ C. Ashley Royal
C. ASHLEY ROYAL, JUDGE
UNITED STATES
DISTRICT COURT

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

GEORGIACARRY ORG INC et al, Plaintiffs	*	
vs.	*	Case Number 5:10-CV-302 (CAR)
THE STATE OF GEORGIA, et al., Defendants	*	

JUDGMENT

Pursuant to this Court's Order dated January 24, 2011, and for the reasons stated therein, JUDGMENT is hereby entered in favor of Defendants. Plaintiffs shall recover nothing of Defendants. Defendants shall also recover costs of this action.

This 25th day of January, 2011.

Gregory J. Leonard, Clerk

S/ Cheryl M. Alston,
Deputy Clerk