**In the United States District Court**
**For the Northern District of Georgia**
**Atlanta Division**

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| RAINBOW PUSH COALTION;<br>HERMAN SMITH;<br>THE ESTATE OF JAMES<br>CHRISTOPHER JOHNSON III | ) | |
| Plaintiffs | ) | Civil Action File No. 13-CV-3635-JEC |
| v. | ) | |
| HON. NATHAN DEAL, *et.al.*,<br>Defendants | ) | |

# BRIEF IN SUPPORT OF INTERVENOR'S MOTION TO DISMISS

## Introduction

Intervenor filed a Motion to Intervene on November 5, 2013. In anticipation of the Court's granting such Motion, Intervenor now moves to dismiss pursuant to Fed.R.Civ.Proc. 12(b)(1)) and 12(b)(6). Intervenor will show that Plaintiffs utterly lack any semblance of standing to bring their case and thus this Court has no jurisdiction to proceed. Even if there is standing, however, Plaintiffs have failed to state a case for which relief can be granted.

## Argument

## I. Plaintiffs Lack Standing

Article III, Section 2 of the Constitution limits the jurisdiction of the federal courts to "cases" and "controversies." Courts do not render advisory opinions. "The party invoking federal jurisdiction bears the burden of proving standing." *Bischoff v. Osceola County Florida*, 222 F.3d 874, 878 (11th Cir. 2000), *citing* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an injury in fact – an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision. The party invoking federal jurisdiction bears the burden of establishing these three elements.

*Lujan*, 504 U.S. at 560-561 (internal citations and quotation marks omitted). Intervenor will discuss each element in turn.

### I.A. Injury

Plaintiffs claim to have suffered an injuries in a variety of ways, so they will be examined individually.

Plaintiff Rainbow Push Coalition ("Rainbow") claims to have suffered an injury because it had to "divert significant resources away from activities central to its mission. For example, SB 396 has caused [Rainbow] to hold several rallies to oppose the law."

Rainbow's alleged injury, therefore, is that it had to stop doing its regular work and instead oppose the Statute. Rainbow thus fails to articulate an injury that is "concrete and particularized." If Rainbow's alleged injury were sufficient to give it standing, then anyone who disliked any law could claim to have standing because he had to spend time opposing the law. Clearly that is not the case, and the argument turns *Lujan* on its head.

While it is possible for an organization to have "organizational standing" based on the standing of its members, Rainbow cannot meet the requirements for that, either. Organizational standing requires that 1) the organization's members have standing in their own right; 2) the interests the organization seeks to protect are germane to its purpose; and 3) neither the claim asserted nor the relief requested requires the participation of individual members. *Hunt v. Washington Apple Advertising Commission;* 423 U.S. 333, 343 (1977). In the present case, Rainbow fails the first test right out of the chute. Rainbow does not allege anything about anyone whom Rainbow claims is a member. That is, Rainbow has

failed to demonstrate that anyone who is a member of Rainbow has standing in his own right.

It also is questionable whether Rainbow could pass the second *Hunt* test. Rainbow alleges that this case is diverting Rainbow's resources away from Rainbow's primary work. This allegation leaves one wondering if the present case is a frolic for Rainbow or if the case is germane to Rainbow's purpose.

Lastly, because Rainbow has not identified any members, it is impossible to say if any members' participation is necessary or not.

The next Plaintiff, Herman Smith, claims to have been injured on account of his conviction for felony murder. Intervenor will assume for the sake of discussion that Smith's conviction is an injury that is concrete and particularized.

The final Plaintiff, Estate of Christopher Johnson III[1] claims to have suffered injury because the man who killed Johnson ("Edmondson") was not convicted of Johnson's murder. Plaintiffs implicitly assert, therefore, that a deceased (or his estate) suffers injury when the deceased's alleged murderer is acquitted. This is a novel and quite dubious claim. For the sake of argument, however, Intervenor will assume this is an adequate injury.

[1] The Complaint caption shows the only Johnson Plaintiff to be Johnson's estate, but the body of the Complaint (¶¶ 23 *et.seq*.) describe Johnson's parents as plaintiffs. For this Motion, Intervenor will assume that Johnson's parents are the representatives of Johnson's estate, even though the Complaint lacks any allegations of such fact.

To the extent any of the Plaintiffs claim an imminent future injury, such injury is completely speculative or hypothetical. No Plaintiff can reasonably claim he is likely to suffer any harm in the future on account of the Statute.

I.B. There is No Causation

It goes without saying that without an injury there can be no causation. With no injury to Rainbow, Rainbow can show no causation. Only Smith and Johnson's estate are in a position to discuss causation. Neither one, however, can show the causation necessary. *Lujan* requires a direct causal link between the injury and the conduct complained of, without intervening action of some third party.

In the case of Smith, Smith was convicted by a jury of his peers. Smith complains that his injury was his conviction. No action of either Defendant (the Governor or the Attorney General) had any bearing on Smith's conviction. It was a prosecutor, a judge, and a jury that were directly responsible for obtaining Smith's conviction, and none of those third parties are before the Court.

In the case of Johnson's estate, again, the acquittal of Edmondson was the work of those involved in Edmondson's trial, not the Governor or the Atotrney General.

The major problem with Plaintiffs' causation arguments is that the Defendants do not implement affirmative defenses to criminal statutes. They may be thought of as implementing criminal statutes, having some responsibility for

execution of the laws of the State, but they have no role, even an esoteric one, in executing affirmative defense statutes.

I.C. No Injury Is Redressable Against Defendants

Again, because there is no injury, there is nothing to redress for Rainbow. But, again assuming *arguemdo* that there is an injury to Smith and Johnson's estate, those injuries could not be redressed against the two Defendants (or anyone else).

In the case of Smith, he was convicted of murder. He could have appealed his conviction, but the Complaint gives no indication of whether that happened. No opinions from either the Court of Appeals of Georgia or the Supreme Court of Georgia can be found. That means either Smith did not appeal or his appeal was disposed of without an opinion. Either way, this Court is not in a position to provide relief to Smith, at least not in the context of this case. Smith seeks injunctive relief that the Statute is unconstitutional because the jury convicted him in the fact of his invocation of the affirmative defense. To the extent Smith can obtain relief, he should do so in the form of a petition for habeas corpus.

According to the Georgia Department of Corrections, Herman Lee Smith III is incarcerated in the Georgia Diagnostic and Classification Prison near Jackson, Butts County, Georgia. Butts County is in the Middle District of Georgia, Macan Division. Smith would have to file his habeas petition with that court.

In the case of Johnson's estate, Edmondson was acquitted of Johnson's murder. There is no relief that can be provided to Johnson's estate, or even Johnson's parents, to change that. Even if this Court were to order the relief requested (declaratory and injunctive relief pertaining to the constitutionality of the Statute), Edmondson's acquittal would not (and cannot) be disturbed.

Plaintiffs claim that "so long as the Stand Your Ground law remains in effect the estate of Mr. Johnson will continue to suffer from its application." Plaintiffs do not explain this claim. It is difficult to conceive how the application of a state criminal affirmative defense statute can cause continuing harm to an alleged murder victim. Johnson's estate could, if it chose, bring a wrongful death action against Edmondson. It is entirely possible for a murder defendant to be acquitted of criminal charges yet found civilly liable for the death. The much-ballyhooed O.J. Simpson trials illustrates that.

I.D. The Statute Is Not to Blame

Even if the Court were to grant Plaintiffs the relief they seek (declaration that the Statute is unconstitutional), nothing in Georgia law would change. The Supreme Court ruled in 1898 that there is no duty to retreat in Georgia. *Glover v. State*, 105 Ga. 597, 31 S.E. 584 (1898) ("[I]f the accused was not at fault, he was under no obligation to retreat….").

Plaintiffs point to language not contained in the Statute, requiring a "reasonable belief" that force is necessary, and call such language unconstitutionally vague. As noted, however, that language is not in the Statute, and even if the Court were to strike down the Statute, the allegedly vague language would remain. Thus, the relief sought will not help Plaintiffs even if they have suffered an injury.

Plaintiffs also claim that the Statute "eliminated the requirement that force be met with no greater than equal force when acting in defense of a habitation." Complaint, ¶ 41. This simply is not true. A review of SB 396, attached as an exhibit to this Brief for the Court's convenience, reveals no such elimination. In fact, the Statute clearly references using force as describe in existing law, not creating a new standard of level of force that can be used.

**II. Failure to State a Claim for Which Relief May be Granted**

Plaintiffs' bring a facial challenge to the Statute (Complaint, introduction). The Complaint contains a single count, for violation of the 14th Amendment's Due Process Clause. Complaint, p. 28. Plaintiffs complain that the phrase "reasonably believes" is not defined in the Statute and is therefore void for vagueness.

Plaintiffs' argument contains a glaring, fundamental flaw: The statute does not use the phrase "reasonably believes." The Statute Plaintiffs challenge, O.C.G.A. § 16-3-23.1, states in its entirety:

> A person who uses threats or force in accordance with Code Section 16-3-21, relating to the use of force in defense of self or others, Code Section 16-3-23, relating to the use of force in defense of habitation, or Code Section 16-3-24, relating to the use of force in defense of property other than a habitation, has no duty to retreat and has the right to stand his or her ground and use force as provided in said Code section, including deadly force.

Nowhere in the Statute do the words "reasonably believes" appear. That phrase appears in O.C.G.A. § 16-11-21(a), which is referenced in the Statute. The phrase pre-dates SB 396 and the Statute, however, and codifies general self-defense law. The phrase has been part of the Georgia Code since at least 1968. 1968 Ga.Laws. p. 1272, enacting Code Section 26-902(a):

> A person is justified in threatening or using force against another when and to the extent that he ***reasonably believes*** that such threat or force is necessary to defend himself or a third person against such other's imminent use of unlawful force; however, a person is justified in using force which is intended or likely to cause death or great bodily harm only he ***reasonably believes*** that such force is necessary to prevent death or great bodily injury to himself or a third person, or the commission of a forcible felony.

[emphasis supplied]. The Court will no doubt notice that the 1968 language is virtually identical to the present day O.C.G.A. § 16-3-21(a).

Plaintiffs make the novel and ultimately unworkable argument that a "reasonableness" test is unknown in the law and inherently unconstitutional. The phrase "reasonably believes," however, is used throughout the Georgia Code. 1973 Ga. Laws, p. 1220 (HB 264), relating to suspension of securities dealers' licenses ("Where the Commissioner ***reasonably believes*** that there are grounds for

revocation or suspension…."); *Id.*, p. 1227, relating to securities registration statements ("expenses of the offering which the issuer ***reasonably believes*** to be necessary…."); 1974 Ga. Laws, p. 281 (HB 1676), relating to pre-need funeral service planning ("Secretary of State may require such increase of deposit as he ***reasonably believes*** necessary…."); 1977 Ga. Laws, p. (HB 293), relating to regulation of water resources ("[Director may impose obligations on any person who the] Director ***reasonably believes*** is [violating water laws]"); 1977 Ga.Laws, p. 735 (HB 678), relating to regulation of financial institutions ("whom the director or officer ***reasonably believes*** to be reliable…which the director or officer ***reasonably believes*** to be within such person's … which committee the director or officer ***reasonably believes*** to merit confidence…."); 1981 Ga.Laws, p. 1454 (SB 23), relating to powers of the Georgia State Patrol ("member of the Georgia State Patrol ***reasonably believes*** that his failure to act could result…."); 1982 Ga.Laws , p. 636 (SB 364), relating to regulation of insurance companies ("If the insurance institution … ***reasonably believes*** that illegal activities have been conducted…."); 1984 Ga.Laws, p. 549 (SB 101), relating to abandoned motor vehicles ("if such peasce officer ***reasonably believes*** that the person who left such motor vehicle…."); 1986 Ga.Laws, p. 490 (HB 1363), relating to use of deadly force by peace officers ("only when the officer ***reasonably believes*** that the suspect possesses a deadly weapon…."); 1988 Ga.Laws, p. 1803 (HB 1281), relating to

AIDS testing ("The child is ***reasonably believed*** to be sexually active…."); *Id.*, p. 1808 ("physician ***reasonably believes*** that the spouse or sexual partner… physician or administrator ***reasonably believes*** to be a person at risk…."); *Id.*, p. 1809 ("any other person ***reasonably believed*** to be a person at risk…."); *Id.*, p. 1826 ("That person is ***reasonably believed*** to be sexually active while incarcerated;"); 1989 Ga.Laws, p. 941 (HB 334), relating to the Georgia Uniform Limited Partnership Act ("the general partner ***reasonably believes*** to be in the nature of trade secrets…."); 1995 Ga.Laws, p. 927 (HB 212), relating to use of Georgia Dept. of Public Safety insignia ("person making such request ***reasonably believes*** that the commissioner has acted in bad faith…."); 1996 Ga.Laws, p. 646 (SB 508), relating to body piercing ("The person ***reasonably believes*** such minor to be 18 years of age or older."). [Emphasis supplied].

It is clear the phrase "reasonably believes" is rampant within the law and pervades nearly every aspect of society. Government officials may take action against citizens when the officials form reasonable beliefs; citizens are required to take certain action, are permitted to take certain action, or are forbidden from taking certain action, all based on their reasonable beliefs.

Indeed, the "reasonable man" standard has been in use for over 170 years. *Vaughan v. Menlove*, 132 ER 490 (CP 1837). The *Vaughan* case from England is commonly thought to be the first case where the concept of a reasonable man was

first articulated, but even there it was acknowledged that "the care taken by a prudent man has always been the rule laid down…." Oliver Wendell Holmes included the reasonable man standard in *The Common Law*, (2nd ed., 1909), p. 108. ("A certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare" and therefore courts "decline to take [a specific individual's] personal equation into account.")

Against this backdrop of universal use and acceptance of reasonableness when applying the law, Plaintiffs' claim that the reasonable belief requirement, which is not even in the Statute complained of, cannot stand.

When bringing a facial challenge to a statute, a plaintiff has the burden of convincing the court that the statute never can be constitutionally applied ***under any circumstances.*** *Jacobs v. The Florida Bar*, 50 F.3d 901, 903 (11th Cir. 1995). In the present case, Plaintiffs have not even begun to meet this burden. Instead, Plaintiffs cite cases anecdotally where they claim a guilty defendant was acquitted and an innocent defendant was convicted, both as a result of incorrect ***application*** of the Statute. At best, Plaintiffs make out cases for ***as applied*** challenges.

Plaintiffs claim that the Statute is unfairly applied across races – again, they focus on the ***application*** of the Statute. They claim, for example, that "in practice," the Statute does not apply to "any individual who holds a 'reasonable belief.'" Complaint, ¶59. What Plaintiffs ignore is that juries are the ultimate

arbiters of what beliefs are reasonable and what beliefs are not. Plaintiffs assume that juries have ignored the judges' instructions when a verdict is reach that is at odds with Plaintiffs' preferences. They apparently do not consider the possibility that the juries did not accept the position of the losing party. A jury may find that a murder defendant's belief was not reasonable and therefore convict a person Plaintiffs would have preferred to see acquitted. This Court should not and cannot engage in the business of second-guessing state court jury decisions.

The fundamental flaw in Plaintiffs' claim can be found in ¶ 65 of the Complaint, where they allege in one example that a person "should have been immune from prosecution as he ***subjectively*** held a 'reasonable belief' that a crime was going to be committed against himself." [Emphasis supplied.] The emphasized language underscores Plaintiffs' problem. They mistakenly believe that the "reasonably believes" standard is subjective, when it plainly is objective. It is illogical to think that the legal standard is a "subjectively reasonable" one. Otherwise, anyone who testifies that he believed he was under attack would benefit from the affirmative defense. A reasonableness test is of necessity an objective one. It is quite astonishing that Plaintiffs think otherwise, but their arguments throughout their Complaint certainly are consistent with such a misguided notion.

In support of their erroneous contention that the reasonableness test should be applied subjectively, Plaintiffs give an example of speed limits. In their

example, Plaintiffs dismiss the notion that there could be a[n objective] reasonableness test on vehicle speeds. Plaintiffs allege, "There is no law which says individuals are allowed to go the speed which they "reasonably believe" is correct and prudent.

Quite the contrary, "No person shall drive a vehicle at a speed greater than is a reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing." O.C.G.A. § 40-6-180. Despite Plaintiffs' protestations, we live in a world governed by reasonableness.

II.A. Plaintiffs' Misunderstand the Criminal Immunity Law

Plaintiffs then complain about "Section 2" of SB 396, but in doing so display their lack of understanding of the legislation. Section 2 of SB 396 made no material substantive changes to the law.

Georgia takes a layered approach to the law of self defense. The general rules of self defense, which is what have been discussed so far in this Brief, apply to everyone. Georgia then adds a layer to that applicable to most, but not all, people. In addition to the generally available self defense, Georgia law allows that people who lawfully possess a weapon and use that weapon in conformity with the general self defense laws not only have an affirmative defense, but are immune from prosecution. O.C.G.A. § 16-3-24.2.

SB 396 made two changes to § 16-3-24.2. First, it expanded the immunity provision to apply to all self defense scenarios under Georgia law (including the new Code section itself created by SB 396 (§ 16-3-23.1). Second, it made a subtle wording change from "any deadly force used by" to "in the use of deadly force." Other than those changes, SB 396 left § 16-3-24.2 exactly as it was. Nevertheless, Plaintiffs treat Section 2 of SB 396 as thought it ***created*** the immunity provision. It did not. The immunity provision was created in 1998. 1998 Ga.Laws, p. 1153. That is, the immunity provision predates the bill of which Plaintiffs are complaining by nine years.

In addition, Plaintiffs misstate the affects of the immunity provision. Plaintiffs claim the immunity provision creates a second class of citizen that is "not allowed to defend themselves from eminent threats of death even within his own home." Complaint, ¶ 68. First, as noted above, the general self defense statutes apply to everyone, even prison inmates. Anyone is permitted to avail himself of the various self defense affirmative defenses, especially in his own home.

The only question is whether such a person also can avail himself of the immunity provisions of O.C.G.A. § 16-3-24.2. He can, "unless in the use of deadly force, such person utilizes a weapon the carrying or possession of which is unlawful by such person under Part 2 or 3 of Article 4 of Chapter 11 of this title." The "second class citizens" of which Plaintiffs complain are people who illegally

possess machine guns, silencers, short barreled rifles or shotguns (16-11-123); people who carry a weapon without a license (16-11-126); people who carry a weapon in an unauthorized location (16-11-127); people who carry weapons in a school zone (16-11-127.1); convicted felons possessing firearms (16-11-131); and minors possessing handguns (16-11-132). That is, people committing weapons crimes by carrying or possessing weapons they are not authorized to carry or possess cannot be immune from prosecution if they use those weapons in self defense. They still can avail themselves of the affirmative defense of self defense, they just cannot claim immunity.

Of the crimes listed above, the only ones that apply in homes are illegally possessed weapons (silencers, machine guns, sawed off rifles and shotguns, and felons in possession of firearms). There is an exception in § 16-11-132 for minors possessing handguns in the home with parents permission. It is difficult to understand Plaintiffs' concerns about these "second class citizens" who themselves are committing state and federal felonies by possessing the weapons even in the home. In any event, none of the Plaintiffs allege that they are in the prohibited classes of people, so there is no relief that could be granted to them.

Moreover, they plainly misrepresent the content and effect of the Statute. For example, Plaintiffs claim that under SB 396 "All Georgians, and particularly those of color, will be compelled to at all times prove that they are not taking part

in any action which may lead an individual to form a 'reasonable believe' that they are posing a threat to them." Complaint, ¶5. Plaintiffs overlook that the Statute relates only to affirmative defenses of certain crimes. It does not purport to impose any kind of obligation on victims of alleged crimes. To suggest otherwise is disingenuous.

Plaintiffs then posit the hypothetical that "is is highly unlikely that an average 25 year old African American male will be able to invoke the defense that he held a 'reasonable belief' that an 80 year old ***unarmed*** white female posed a threat to him and justified the use of deadly force against her." Complaint, ¶ 6 [emphasis supplied]. First, it should be noted that Plaintiffs needlessly and gratuitously inject race into the hypothetical. The hypothetical would be no less true if the young man were white and the elderly woman were black. The hypothetical serves no purpose other than to race-bait. It is self-evident that a young man is not generally physically threatened by an elderly woman, but that illustrates nothing other than to point out there are some instances where affirmative defense will be unavailable.

Plaintiffs also claim that "SB 396 constitutes a sweeping and comprehensive state scheme expanding the ability of individuals to use deadly force based upon minimal ***or no provocation*** in Georgia. Complaint, ¶ 9 [emphasis supplied]. This claim is reckless and irresponsible. Plaintiffs point to nothing in the language of

the Statute that even remotely implies that the Statute sanctions killing with ***no provocation.*** It is a ridiculous and frivolous claim.

Plaintiffs also claim that SB 396 "abrogates the duty to retreat before using deadly force." Complaint, ¶14. Again, this is demonstrably false and irresponsible. Georgia never has had a "duty to retreat." *See, e.g., Glover v. State,* 105 Ga. 597, 31 S.E. 584 (1898). Because there never was a duty to retreat, there was nothing for SB 396 to abrogate.

Plaintiffs then claim that the Statute "eliminated the requirement that force be met with no greater than equal force when acting in defense of habitation." Complaint, ¶ 41. Again, this is just plain false. The defense of habitation statute, dating at least to 1833, has never imposed an "equal force" requirement. Georgia Laws of 1833, 4th Division, ¶ 41, Sec. XIV (Cobb's 1851 Digest, p. 785):

> If after persuasion, remonstrance, or other gentle measures used, a forcible attack and invasion on the property or habitation of another, cannot be prevented, it shall be justifiable homicide to kill the person so forcibly attacking and invading on the property or habitation of another; but it must appear that such killing was absolutely necessary to prevent such attack and invasion, and that a serious injury was intended, or might accrue to the person, property, or family of the person killing.

Thus, killing was justified to repel the threat of serious injury in a habitation – this is hardly an expression of equal force.

Plaintiff's then contend that SB 396 "created a new right for individuals to use deadly force based upon their 'reasonable belief' that a violent encounter may

happen without first attempting to withdraw and without regard to the proportionality of the response. Complaint, ¶42. Again, this is a complete fabrication. SB 396 merely codified the existing common law lack of a duty to retreat. To suggest otherwise is just not supported by fact.

Next, Plaintiffs claim that prior to SB 396, the law required that a person be a "victim" of a crime prior to the use of deadly force. Complaint, ¶ 58. That is, a person could not use deadly force to defend another. Again, however, this is not true. Referring the Court to the except above from the Laws of 1833, deadly force could be used to prevent an attack on the person, property, ***or family*** of the person. That is, the person did not have to be a victim himself.

**Conclusion**

In essence, Plaintiffs complain about the outcome in particular criminal cases and hold them up as proof that the Statute is unconstitutional. The federal courts are not here, however, to second guess the state criminal courts. The avenue of relief for dissatisfaction with individual case outcomes is to appeal, or in proper cases to file petitions for writs of habeas corpus. The federal courts are not the complaint desk for state legislatures. This Court therefore lacks subject matter jurisdiction to proceed and must therefore dismiss this case.

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## CERTIFICATE OF SERVICE

I certify that on November 5, 2013 I served a copy of the foregoing using the ECF system upon:

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and via U.S. Mail upon

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