# Docket No. 10-11951-C

**The United States**
**Court of Appeals**
**For**
**The Eleventh Circuit**

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**GeorgiaCarry.Org, Inc., *et.al.,* Appellants**
**v.**
**Pinkie Toomer, Appellee**

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**Appeal from the United States District Court**
**For**
**The Northern District of Georgia**
**The Hon. Clarence Cooper, Senior Judge**

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## Brief of Appellants

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**John R. Monroe**
**Attorney at Law**
**9640 Coleman Road**
**Roswell, Georgia 30075**
**(678) 362-7650**
**Attorney for Appellants**

## Certificate of Interested Persons

Appellants certify that the following persons are known to Appellants to have an interest in the outcome of this case:

Cooper, Clarence The Hon.
Dixon, Pat D., Jr., Esq.
Fulton County, Georgia
Georgia, State of
GeorgiaCarry.Org, Inc.
Goyke, Regis
Hyman, Vincent D., Esq.
Lovett, Willie J., Jr., Esq.
Monroe, John R., Esq.
Rosenberg, Steven E., Esq.
Toomer, Pinkie The Hon.
Ware, R. David, Esq.
Welch, Matthew C., Esq.

**Statement on Oral Argument**

Appellants are not seeking oral argument in this case.

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**Statement Regarding Adoption of Briefs of Other Parties**

Appellants do not adopt the brief of any party.

## Statement of Jurisdiction

The District Court had federal question jurisdiction of this case under 28 U.S.C. § 1331, as the Plaintiff sought redress for civil rights violations under the Fourteenth Amendment to the Constitution.

The District Court action was dismissed (completely) on March 16, 2009. Appellants filed a Motion for Reconsideration on March 26, 2009, and the District Court denied the Motion for Reconsideration (which it treated as a motion pursuit to Fed. R. Civ. P. 59) on March 29, 2010. Pursuant to F.R.A.P. 4(a)(4)(A)(iv), the time to file a notice of appeal did not begin to run until the District Court disposed of the Motion for Reconsideration. Appellants filed a Notice of Appeal on April 27, 2010, 29 days after the time to file a notice had run, so their appeal is timely. F.R.A.P. § 4(a)(1)(A).

**Statement of the Issues**

1. The District Court erred in not taking all well-pled facts in the Amended Complaint to be true when deciding a motion to dismiss.

2. The District Court erred in ruling that Appellants lack standing.

## **Statement of the Case**

*Nature of the Case*

This is a civil rights case. Plaintiffs-Appellants GeorgiaCarry.Org, Inc. and Regis Goyke seek declaratory and injunctive relief for Appellees' refusal to allow Appellants to apply for Georgia firearms licenses ("GFLs") on account of Appellants' non-residency within the State of Georgia.[1] Under O.C.G.A. § 16-11-129, a GFL applicant who is not a resident of Georgia (and of the county wherein he applies) is barred from receiving a GFL. A person without a GFL is essentially disarmed in most parts of the state. *See, e.g.,* O.C.G.A. §§ 16-11-126 through 16-11-128.

The right to travel freely from one state to another "occupies a position fundamental to the concept of our Federal Union." *United States v. Guest,* 383 U.S. 745, 757 (1966). States may, of course, have bona fide residency requirements for "services" that they provide to their residents. *Martinez v. Bynum,* 461 U.S. 321, 326 (1983). "This view assumes, of course, that the 'service' that the state would deny to nonresidents is not a fundamental right protected by the Constitution. A state, for example, may

[1] Goyke is a resident of Wisconsin and alleges that he is otherwise eligible for a Georgia firearms license. Appellants are not challenging any other eligibility factor in the Georgia statute. The challenge is only to the constitutionality of the residency requirement.

not refuse to provide counsel to an indigent nonresident defendant at a criminal trial…. ” *Id.* at 328.

The instant case involves just such a fundamental constitutional right. The right to keep ***and bear*** arms is an "individual right to possess and carry weapons in case of confrontation." *District of Columbia v. Heller,* 128 S.Ct. 2783, 2797 (2008). There is no doubt that this right is a fundamental one ("By the time of the founding, the right to have arms had become fundamental…."). *Id.* at 2798. Moreover, "the American people have considered the handgun to be the quintessential self-defense weapon." *Id.* at 2818.

Likewise, the Privileges and Immunities Clause applies to protect citizens from the denial of benefits on account of their non-residency in a state. *Doe v. Bolton,* 410 U.S. 179, 200 (1973) (Georgia's law limiting the availability of abortions to Georgia residents only (and thus discriminating against nonresidents) violated the Privileges and Immunities clause). *See also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753 (1993) ("A woman's right to engage in interstate travel for this purpose (*i.e*, abortion) is . . . entitled to special respect because she is exercising a constitutional right . . . Federal courts are uniquely situated to protect that right for the same reason they are well suited to protect the privileges and

immunities of those who enter other States to ply their trade"). If the availability of abortions, an unenumerated right not mentioned in the Constitution, is "basic to the livelihood of the nation," then it is inconceivable that a specifically enumerated, fundamental right, such as the right to keep and bear arms, is not.

"It is equally clear that a state may not deprive noncitizens of the ability to engage in an essential activity or exercise a basic right." *Lee v. Minner*, 458 F.3d 194 (3rd Cir. 2006) (punctuation omitted). There is no right more basic than what *Heller* terms the "natural right of resistance and self-preservation." 127 S.Ct. at 2798. *See also Chambers v. Baltimore & Ohio R. Co.,* 207 U.S. 142, 148, 28 S.Ct. 34, 52 L.Ed. 143 (1907) (basic right of nonresidents to access courts protected by the Privileges and Immunities Clause); *Chappell v. Rich,* 340 F.3d 1279, 1282-83 (11th Cir. 2003) (basic right of access to courts secured by, *inter alia*, Article IV's Privileges and Immunities Clause).

*Proceedings Below*

Appellants commenced the action below, in the United States District Court for the Northern District of Georgia, against Pinkie Toomer, the judge of the probate court of Fulton County, Georgia, and all other defendants

similarly situated.[2] Appellants sought declaratory and injunctive relief against a Georgia statute prohibiting the issuance of a Georgia firearms license ("GFL") to a non-resident of Georgia on the ground that the statute violated Plaintiffs' privileges and immunities and other federal statutory and constitutional rights. The District Court dismissed the case pursuant to Fed. R. Civ. Pr. 12(b)(1), finding that Appellants lacked standing. Appellants filed a motion for reconsideration, which the District Court denied. Appellants appeal the denial of their motion for reconsideration and the granting of Appellees' motion to dismiss and subsequent entry of judgment.

*Statement of the Facts*[3]

In Georgia, the probate judge of each county is tasked with the administration of the process for issuing Georgia firearms licenses ("GFLs"). O.C.G.A § 16-11-129. Appellee is the probate judge of Fulton County, Georgia. R1-10-2. Appellee maintains a policy of not permitting non-residents of Georgia to apply for and receive GFLs. R1-10-8. Her web site says "You must live in Fulton County." R1-10-9. In addition, O.C.G.A.

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[2] The Motion for Class Certification was denied as moot after the case was dismissed. For the sake of simplicity, Appellants will refer to a single Appellee, Pinkie Toomer, in the remainder of this Brief.

[3] Because this appeal concerns the District Court's grant of a motion to dismiss for lack of standing, in a facial attack on Amended Complaint, all facts stated in the complaint must be taken to be true. *Lawrence v. Dunbar,* 919 F.2d 1525, 1529 (11th Cir. 1990). The statement of facts therefore draws largely on the Amended Complaint, R1-10.

§ 16-11-129(a) does not permit Appellee to allow a non-resident (who is not on active military duty) to apply for or receive a GFL. Appellee has largely delegated the authority to receive and process GFL applications and to make decisions regarding issuance and denial of GFLs, and even to sign GFLs, to the Clerk of the Probate Court of Fulton County, James Brock, and his staff. R1-10-8.

Blank application forms for GFLs are closely guarded, are not available on the internet or otherwise generally available to the public, and a GFL applicant only receives a portion of the complete application packet when applying. R1-10-9. When Appellants' counsel subpoenaed the Fulton County Probate Court for a copy of the blank GFL application, the clerk upon whom the subpoena was served refused to obey the subpoena with a dismissive statement, "We don't just give those out to people." R1-10-10.

A GFL applicant in Fulton County normally has interaction only with the counter clerks and, in exceptional circumstances, with a supervisor. R1-10-8. GFL applicants do not routinely interact with Appellee in any manner. *Id.* Appellee does not allow an application to be "filed" unless the applicant appears to be qualified, and non-resident GFL applicants do not qualify. *Id.*

The counter clerks at the Probate Court of Fulton County act as the "gatekeepers" of the GFL application process, and do not accept an

application until they determine that the application is in order. *Id.* It is not possible to "file" a GFL application without the consent and cooperation of the counter clerks at the Probate Court of Fulton County. R1-10-9.

Appellant Regis Goyke ("Goyke") is a resident of the State of Wisconsin[4] and a member of Appellant GeorgiaCarry.Org, Inc. ("GCO"), an organization dedicated to fostering the rights of its members to keep and bear arms. R1-10-2.[5] Goyke has relatives in Georgia and is a frequent visitor to Georgia to see his relatives. R1-10-5. When he visits Georgia, Goyke usually engages in lawful activities involving firearms, including, but not limited to, recreational shooting of handguns. *Id.* When he visits Georgia, Goyke sometimes brings his own handgun with him from Wisconsin. At other times, he borrows the handguns of his Georgia relatives. R1-10-6. Goyke generally flies from Wisconsin and borrows an automobile from his Georgia relatives. *Id.* Goyke does not have a home or

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[4] Although it is not a crime in Wisconsin to carry a firearm openly without a license, Wisconsin does not issue a license to carry firearms. Therefore, Goyke cannot obtain a license from his home state that would be recognized in Georgia.

[5] GCO alleged that it has other members who are not residents of the State of Georgia. An organization such as GCO has standing to sue when its members would otherwise have standing, the interests it seeks to protect are germane to the organization's purpose, and the case does not require participation of the members. *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 343 (1977); *Georgia Hospital Association v. Department of Medical Assistance,* 528 F. Supp. 1348, 1352 (N.D. Ga. 1982).

place of business in Georgia. *Id.* These facts effectively deny Goyke his right to bear arms and his inherent right to self defense while in Georgia.

O.C.G.A. § 16-11-128 prohibits carrying a handgun outside one's ***own*** home, motor vehicle or place of business without a GFL. O.C.G.A. § 16-11-126 prohibits carrying a concealed weapon, including a handgun, but holders of GFLs are exempt from this law as it pertains to handguns. In addition, those eligible for a GFL may conceal a firearm inside of an automobile, but Goyke is statutorily not eligible for a GFL and therefore cannot conceal a firearm in an automobile without violating this statute. The federal Gun Free School Zone Act, 18 U.S.C. § 922(q), prohibits carrying a firearm in a "school zone," but provides an exception for people traveling through a school zone if they have a license to carry a firearm issued by the state in which the school zone is located.[6]

Goyke wishes to carry a handgun, to carry a concealed handgun, and to carry a handgun while traveling through a school zone when he visits

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[6] Appellants are mindful that, at the time of the writing of this Brief, the General Assembly of Georgia has passed two separate bills, SB 291 and SB 308, that would modify the provisions of O.C.G.A. §§ 16-11-126 through 128 (both bills are awaiting review by the Governor). Under both bills, however, a person such as Goyke, without a GFL and unable to obtain one, still would be prohibited from carrying a handgun in Georgia except within his own home, his own automobile, and his own place of business. Appellants raise this point only to advise the Court that neither bill, if it were to become law, would moot this case.

Georgia, for self-defense and other lawful purposes, but he is in fear of arrest and prosecution for doing so. R1-10-7. If Goyke were able to obtain a GFL, he would not be in danger of such arrest and prosecution.

On June 19, 2008, Appellants' counsel asked Brock if Goyke could apply for a GFL, stating that Goyke is a resident of Wisconsin and not of Georgia. Brock responded, "No, he has to be a domiciliary of Georgia…." R1-10-7. Appellants' counsel informed Brock that Goyke likely would commence a legal action to challenge Goyke's inability to apply for and obtain a GFL, and counsel requested that Brock so inform Appellee. Brock responded, "No problem." *Id.*

*Statement on the Standard of Review*

The District Court's grant of a motion to dismiss pursuant to Fed.R. Civ.P. 12(b)(1)[7] is reviewed *de novo. McElmurray v. Consolidated Government of Augusta-Richmond County,* 501 F.3d 1244, 1250 (11th Cir. 2007). In addition, the District Court's interpretation of state law is reviewed *de novo. Mega Life & Health Ins. Co. v. Pieniozek*, 516 F.3d 985, 989 (11th Cir 2008).

[7] While Appellee moved to dismiss under both Rule 12(b)(1) and 12(b)(6), the District Court only discussed the dismissal under Rule 12(b)(1) in its Order. Because the District Court did not address the merits of Appellants' case, or rule on whether Appellants stated a valid claim under Rule 12(b)(6), that portion of Appellee's Motion is deemed denied.

## Summary of the Argument

The District Court granted Appellee's Motion to Dismiss based on its conclusion that Appellants did not actually apply for a GFL before commencing this action. The District Court overlooked the fact that Appellee 1) has a policy of refusing to permit non-residents to apply, 2) has a web site that states an applicant must be a Fulton County resident, 3) operates under a state statute that categorically prohibits issuance of GFLs to non-residents, and 4) delegated the GFL application process to Brock, who told Goyke's counsel that Goyke could not apply because Goyke is not a Georgia "domiciliary." Not only was Goyke not permitted to apply, but his attempt to do so would have been a futile act.

The law does not require someone to engage in a futile act, and the futility of doing an act creates an exception to the "injury" prong of the elements of standing.

## Argument and Citations of Authority

### *1. The District Court erred in failing to take as true the facts in the Amended Complaint.*

In deciding a motion to dismiss for lack of standing, the trial court is not a fact finder, but the facts alleged in the complaint must be taken to be true. *Lawrence v. Dunbar,* 919 F.2d 1525, 1529 (11th Cir. 1990). Such facts

must be viewed in a light most favorable to the plaintiffs. *Mega Life & Health Ins. Co. v. Pieniozek*, 516 F.3d 985, 989 (11th Cir 2008).

Although the District Court recited several facts from the Amended Complaint, it discounted or disregarded some of them. For instance, the District Court recited that Appellee has delegated the administration of the GFL application process to Brock, but then countered that ***fact*** by making the ***legal conclusion*** that "it is the probate judge that has the sole authority to issue GFLs." R1-26-6. The District Court then found lack of standing because Appellee was not personally involved in telling counsel that Goyke could not apply for a GFL.

Assuming *arguendo* that the District Court's legal conclusion is correct, that conclusion only serves as an indictment of Appellee's delegation of her authority. It does not alter the fact (that the Court must assume to be true) that Appellee has made the delegation. Appellee cannot delegate her authority and then escape liability for the acts of her delegate by hiding behind the illegality of the delegation in the first place. "If [a state official] undertook to delegate any part of that duty to [his assistant], he remains liable not because of [his assistant's] dereliction, but because of his own failure to perform his statutory duty." *Hometrust Life Insurance*

*Company v. United States Fidelity & Guaranty Co.,* 298 F.2d 379, 386 (5th Cir 1962).

In addition, the District Court found a "fact" that does not exist, when it concluded "neither Mr. Goyke nor any other member of GCO, at the time that this action was commenced, actually requested or submitted an application." The Amended Complaint clearly makes the factual allegation that Goyke's counsel actually ***subpoenaed*** an application, and the subpoena was disobeyed. R1-10-10.

### *2. The District Court Erred By Denying Appellants Standing For Failing to Apply for GFLs*

### 2A. The Law Does Not Require a Futile Act

The District Court dismissed the case because Goyke did not allege that he actually applied for a GFL, despite his clear ineligibility to do so and despite Brock's statement to counsel that Goyke would not be permitted to apply. The District Court thus dismissed the case because Goyke did not perform a futile act. "The law does not require a futile act." *Ohio v. Roberts,* 448 U.S. 56, 74 (1979), *overruled in part on other grounds by Melendez-Diaz v. Massachussetts,* 129 S.Ct. 2527 (2009).

The facts of this case are largely analogous to *King v. Civil Service Commission,* 382 F.Supp. 1128 (S.D. NY 1974). In *King,* potential applicants for the New York Board of Examiners (for New York City school

teachers) sued because they alleged the requirements to be on the Board were racially discriminatory. They did not apply to take the necessary examination before they sued, however, because they lacked the statutory qualifications to serve on the Board.

The defendants in *King* challenged the plaintiffs' standing, because the plaintiffs had not applied and been turned down before they sued. In addressing the standing argument, the court said, "[Plaintiffs] cannot be denied standing for failing to do a futile act…. [I]f [King] had not failed the examination, he could have been eliminated nonetheless as not meeting all the prerequisites." 382 F.Supp. at 1132.

Likewise in *Byrd v. International Brotherhood of Electrical Workers,* 375 F.Supp. 545 (D. Md 1974), the defendant claimed a worker lacked standing to sue for employment discrimination when the worker did not apply for a job for which he lacked the stated qualifications. The court denied the defendant's standing argument, saying, "In this court's view a futile act was not necessary to be performed by plaintiff Lane in order to give him standing." 375 F.Supp. at 568. *See also Settles v. U.S. Parole Commission,* 429 F.3d 1098 (D.C. Cir 2005) (ruling that a person had standing to sue over a rule prohibiting representation at a hearing without actually attempting to have a representative at the hearing); *DLX, Inc. v.*

*Kentucky,* 381 F.3d 511, 525 (6th Cir. 2004) (a person need not seek a variance from a regulation where it would be an "idle and futile act"); *Corn v. Lauderdale Lakes,* 816 F.2d 1514, 1516 (11th Cir. 1987) (a property owner in an inverse condemnation suit need not seek a variance when to do so would be futile); *Samaad v. Dallas,* 940 F.2d 925, 934 (5th Cir. 1991) (property owner need not seek just compensation from government before suing for takings if to do so would be futile); *Cutler v. Hayes,* 818 F.2d 879, 891 (D.C. Cir. 1987) (exhaustion of remedies doctrine does not apply when application of the doctrine would be futile); *Pime v. Loyola University of Chicago,* 803 F.2d 351, 353 (7th Cir. 1986) (job discrimination plaintiff need not apply for job before suing if to do so would be futile).

Appellee did not and cannot argue that Goyke's application for a GFL would have been anything but futile. As noted above, she has delegated the GFL process to Brock. Brock said Goyke would not be permitted to apply, and indeed Appellee has a policy of not issuing GFLs to non-residents. In addition to all of this, the state law she is administering clearly prohibits issuing GFLs to non-residents. Residency is a statutory requirement of eligibility.

The District Court considered and rejected Appellants' futility argument [R1-26-8]. The District Court reasoned that Appellants' injury

could not be redressed by a favorable decision, because Appellants may not be able to obtain GFLs for some reason other than their non-residency. This logic is flawed, for two reasons.

First, even assuming *arguendo* that Appellants' injury cannot be redressed, that conclusion does not undermine a futility argument. In order to have standing, a plaintiff must have 1) injury (or threatened injury), 2) causation by defendant, and 3) redressability. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). Futility is an exception to the injury requirement. It does not bear on redressability. A futility argument cannot therefore be adequately rebutted with a claim of lack of redressability.

Second, Appellants' injury can be redressed. Appellants are suing because Appellee will not allow Appellants to apply for and receive a GFL ***on account of Appellants' non-residency***. All Appellants are seeking is declaratory and injunctive relief preventing Appellee from unconstitutionally denying Appellants the right to apply for and receive a GFL ***for that reason.*** While Appellants' ultimate goal is to obtain GFLs, they are not asking the courts to order Appellees actually to issue GFLs or override any other statutory requirement for eligibility. In fact, Plaintiffs do not challenge any of the other eligibility requirements for firearms license applicants. Plaintiffs' sole challenge is to the unconstitutional residency requirement for

GFL applicants. Plaintiffs only want to be able to apply for and obtain GFLs on equal footing with Georgia residents.

The Supreme Court has long since held that where the enforcement of a statute is certain, a preenforcement challenge will not be rejected on ripeness grounds." *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1164 (11th Cir ), *citing Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974). In the instant case, Appellee has a policy of not accepting applications from non-residents. Her web site declares it publicly, and her clerk, to whom she has delegated the administration of the GFL process, confirmed it with Appellants' counsel. The state statute flatly forbids Appellee from issuing GFLs to non-residents. It is thus an absolute certainty that Appellants would not be permitted to apply, or if they were so permitted, their applications would be rejected on residency grounds. Under *Browning* and *Regional Rail*, Appellants' case should not have been rejected on ripeness grounds.

The District Court acknowledged Appellants' allegation that Goyke meets all other eligibility requirements (and could therefore obtain a GFL if he were permitted to apply), but deemed that allegation to be insufficient on the grounds that a probate judge is not obligated to issue a GFL to an eligible applicant. According to the District Court, "a probate judge's decision to

issue a GFL is a matter of discretion." As authority for this erroneous conclusion, the District Court cited to *Propst v. McCurry,* 252 Ga. 56 (1984).

Whether the issuance of GFLs is discretionary or mandatory was not an issue in the *Propst* case, so the citation made by the District Court was to *dictum.* The sole issue in *Propst* was whether a probate judge could require a GFL applicant to sign a release for the probate judge to obtain records about the applicant's mental health hospitalization. The discretionary/mandatory nature of GFL issuance was not discussed. The context of the opinion makes clear that the court did not analyze the distinction.

At one time the Attorney General of Georgia opined that issuance of GFLs was discretionary, before Georgia became a "shall issue" state in 1976. *See., e.g.,* Attorney General Opinions U75-10, U75-10, and U72-112. The Attorney General withdrew those opinions after the General Assembly inserted the words, "shall issue the applicant a license" into the statute. U89-21.[8] This opinion was affirmed in *Moore v. Cranford,* 285 Ga.App.

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[8] The Attorney General opined that the only issue over which the probate judge had any discretion was whether to go ahead and issue a license to a person that had received inpatient treatment at a mental hospital or alcohol or drug treatment center, which was the issue being addressed by the Georgia Supreme Court in *Propst*.

666, 670 (2007) ("[T]he legislature expressly provided that the probate court *shall* issue a license…. The use of the term "shall" means that the probate judge has no discretion…."). [Emphasis in original].

Even if Appellee had the authority to deny Goyke a GFL if he meets all the eligibility requirements (which she does not), the District Court erred in dismissing the case on that basis. Goyke seeks the ability to ***apply for*** a GFL just as a Georgia resident can. The relief sought by Appellants is declaratory and injunctive relief that they not be denied the ability to apply for and receive a GFL ***on account of non-residency in Georgia.*** Again, Appellants do not challenge any other eligibility requirement in the Georgia statute. Appellants challenge only the constitutionality of the residency requirement.

## 2B. The State-County Distinction Makes no Difference

On reconsideration, the District Court concluded that, even if it granted Appellants the relief sought, Appellee could reject an application on account of Appellants' non-residency in Fulton County. R1-35-5. The District Court focused on the requirement in O.C.G.A. § 16-11-129 that a probate judge issue GFLs only to residents of the ***county*** in which the probate judge has jurisdiction. Thus, the District Court reasoned, if the District Court required Appellee to accept Goyke's application

notwithstanding Goyke's non-residency in Georgia, Appellee could reject Goyke's application on account of Goyke's non-residency in Fulton County.

This conclusion is aimed more at the merits of the case than at the issue of standing. A motion to dismiss that attacks the merits should be denied, and the case should be decided on the merits at a later stage or using summary judgment standards. *Morrison v. Amway Corp.,* 323 F.3d 920 (11th Cir 2003); *United States v. North Carolina,* 180 F.3d 574 (4th Cir. 1999).

Moreover, the conclusion is flawed. Appellants contend that their constitutional rights are violated by Appellee because she issues GFLs only to residents of Georgia. Should Appellants prevail on this issue on the merits, they obviously cannot overcome the fact that they also are not residents of any county in Georgia. In order for the District Court to give them meaningful relief, they must be permitted to apply for and receive GFLs notwithstanding their non-residency in Georgia ***and notwithstanding their non-residency in Fulton County.***

Appellants are not attacking the applicability of any policies as they apply to Georgia residents regarding in what counties those residents must apply for GFLs. It is self-evident, however, that a non-resident of Georgia also is not a resident of any county in Georgia. The Constitution cannot

permit a state to skirt privileges and immunities/right to travel requirements by granting privileges only to residents of the several counties, on the grounds that state residency is not specifically required.

## 2C. Standing to Sue a Different Defendant is Irrelevant

The District Court gave as one reason for dismissing the case for lack of standing, "there has been no showing that either Mr. Goyke or another member of GCO ever attempted to apply for a GFL ***in any other county*** in an effort to receive a final determination and then to have a ripe controversy to present to the Court." R1-26-7 [Emphasis supplied]. The District Court does not attempt to explain how applying for a license in Glynn County or Toombs County could give Appellants standing to sue the probate judge of ***Fulton County.*** Whether Appellants had, or could have obtained, standing to sue a different probate judge in one of Georgia's other 158 counties is completely irrelevant to the issue of standing to sue Appellee. Appellants brought their case against Appellee. They either had standing to sue her or they did not (they did). Standing to sue the probate judge of Fulton County cannot be achieved by creating standing to sue any of the other 158 probate judges in the state.

## Conclusion

Appellants have shown the requisite elements of standing. They have injury, in that they are not permitted to apply for GFLs on account of their non-residency in Georgia (they need not have attempted to apply for GFLs, because to do so would have been futile). The injury was caused by Appellee, through her categorical policy of not permitting non-residents to apply, stated prominently even on her web site. Moreover, she delegated to the Clerk the task of administering the GFL process, and the Clerk informed Appellants' counsel that, consistent with Appellee's policy, Appellants could not apply because they are not residents of Georgia. Finally, the injury to Appellants, which is Appellee's refusal to permit them to apply on an unconstitutional basis, can be redressed by the court with declaratory and injunctive relief requiring Appellee to accept and process Appellants' GFL applications without regard to their non-residency. Because Appellants have standing, this Court should reverse the District Court and remand the case to the District Court with instructions to conduct additional proceedings as are appropriate given Appellants' standing.

JOHN R. MONROE
ATTORNEY AT LAW

____________________
John R. Monroe
Georgia State Bar No. 516193

9640 Coleman Road
Roswell, GA 30075
Telephone: (678) 362-7650
Facsimile: (770) 552-9318

ATTORNEY FOR APPELLANTS

**Certificate of Compliance**

I certify that this Brief of Appellants complies with F.R.A.P. 32(a)(7)(B) length limitations, and that this Brief of Appellants contains 4,566words as determined by the word processing system used to create this Brief of Appellants.


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John R. Monroe<br>
Attorney for Appellants<br>
9640 Coleman Road<br>
Roswell, GA 30075<br>
State Bar No. 516193<br>
678-362-7650

## Certificate of Service

I certify that I served a copy of the foregoing Brief of Appellants via U.S. Mail on June 2, 2010 upon:

R. David Ware, Esq.
Office of the County Attorney
141 Pryor Street, SW, Suite 4038
Atlanta, GA 30303

______________________________
John R. Monroe
Attorney for Appellants
9640 Coleman Road
Roswell, GA 30075
State Bar No. 516193
678-362-7650