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

GEORGIACARRY.ORG, INC., *et.al.,*	)	
Plaintiffs,	)	CIVIL ACTION NO. 5:10-CV-302-CAR
v.	)	
STATE OF GEORGIA,*et.al.,*	)	
Defendants.	)	

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Introduction

Plaintiffs brought this action pursuant to 42 U.S.C. § 1983 to challenge the constitutionality of O.C.G.A. § 16-11-127(b)(4), which criminalizes the carrying of firearms in "places of worship" (the "Church Carry Ban"). Because the Church Carry Ban infringes on both the Free Exercise Clause of the First Amendment and the Second Amendment as a whole, the statute is unconstitutional on its face. The Church Carry Ban also infringes on the specific rights of Plaintiffs, so it is unconstitutional as

applied to them. At the hearing on Plaintiffs' Motion for a Preliminary Injunction held August 23, 2010, the Court asked the parties to brief all issues in the case within 30 days. Plaintiffs take this order to be one seeking dispositive briefing, so Plaintiffs are filing the instant Motion for Summary Judgment in response to the order. Because there are no genuine issues of material fact and because Plaintiffs are entitled to judgment as a matter of law, Plaintiffs' Motion for Summary Judgment should be granted.

Factual Background

Plaintiff GeorgiaCarry.Org, Inc. ("GCO") is a non-profit corporation organized under the laws of the State of Georgia. Decl. of Edward Stone (9/21/10), ¶ 4. Its primary mission is to foster the rights of its members to keep and bear arms. *Id.*, ¶ 5. The large majority of GCO's members possess valid Georgia weapons carry licenses ("GWLs"), issued pursuant to O.C.G.A. § 16-11-129.[1] *Id.*, ¶ 6. Plaintiff Edward Stone is the former president of GCO and a current member of the GCO board of directors. *Id.*, ¶3. Stone is a member of GCO, and Stone possesses a valid GWL. *Id.*, ¶ 7. Stone regularly attends worship services as part of his sincerely-held religious

[1] Prior to June 4, 2010, GWLs were referred to as Georgia firearms licenses ("GFLs"). For the sake of simplicity, Plaintiffs will use the term GWL to refer to a license regardless of the date of issuance.

beliefs. *Id.*, ¶ 8. While attending such services, Stone would like to carry a firearm for the defense of himself and his family, but he is in fear of arrest and prosecution for doing so. *Id.*, ¶ 11. Stone is a former police officer. *Id.*, ¶ 12. During Stone's twelve-year law enforcement career in Georgia, Stone regularly attended worship services and carried a firearm with him while doing so. *Id.*

Plaintiff Baptist Tabernacle of Thomaston, Georgia, Inc., (the "Tabernacle") is a non-profit corporation organized under the laws of the State of Georgia. Decl. of Jonathan Wilkins (9/19/10), ¶ 4. The Tabernacle is a religious institution. *Id.*, ¶ 5. The Tabernacle owns real property in Thomaston, Georgia, which the Tabernacle uses regularly to conduct religious worship services. *Id.*, ¶ 6. The Tabernacle would like to allow certain of its members with GWLs to carry firearms on the Tabernacle's property, but is in fear of arrest and prosecution of those members for doing so. *Id.*, ¶ 14.

Plaintiff Jonathan Wilkins is the CEO and pastor of the Tabernacle. *Id.*, ¶ 3. Wilkins is a member of GCO and Wilkins possesses a valid GWL. *Id.*, ¶ 7. Wilkins regularly conducts religious worship services at the Tabernacle's place of worship in Thomaston, Georgia, and the conduct of such services is in keeping with his sincerely-held religious beliefs. *Id.*, ¶ 8-9. While conducting such religious worship services,

Wilkins would like to carry a firearm for defense of himself, his family, and his flock, but he is in fear of arrest and prosecution for doing so. *Id.*, ¶ 10. Wilkins also has an office in the Tabernacle's building. *Id.*, ¶ 11. Wilkins frequently is the only occupant of the building while he is working in his office. *Id.*, ¶ 12. Wilkins would like to keep a firearm in his office for self-defense, but he is in fear of arrest and prosecution for doing so. *Id.*, ¶ 13.

Argument

I. The Church Carry Ban Violates the First Amendment

The statutory scheme under attack generally permits certain behavior (carrying firearms) throughout the state. Such behavior is prohibited only in a few places, including places of worship. Thus, the state bans behavior in churches that generally is allowed, indeed "authorized," elsewhere throughout the state. It is difficult to imagine how this structure can pass constitutional muster.

IA. The Church Carry Ban Infringes the Free Exercise of Religion

The Church Carry Ban, O.C.G.A. § 16-11-127(b), states, 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

… in a place of worship."[2] A misdemeanor is punishable by a fine of up to $1,000 or confinement in the county jail for up to 12 months, or both. O.C.G.A. § 17-10-3.

O.C.G.A. § 16-11-127(c) states, in pertinent part, "[A] license holder … shall be authorized to carry a weapon … in every location in this state not listed in subsection (b) of this Code section…."

A "license holder" is defined by O.C.G.A. § 16-11-125.1(3) be "a person who holds a valid weapons carry license," and a "weapons carry license" is defined by O.C.G.A. § 16-11-125.1(6) to be "a license issue pursuant to Code section 16-11-129." For the sake of simplicity, Plaintiffs will refer to a weapons carry license as a "GWL" (Georgia weapons license).

Putting O.C.G.A. § 16-11-127(b) and (c) together, the regulatory framework established by the State is that a license holder may carry a weapon anywhere in the state with few exceptions. The exception of interest in this case is that a license holder may not carry a weapon in a place of worship.

The First Amendment provides, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."

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[2] Georgia's law is peculiar. Only three other states categorically ban firearms from places of worship, Mississippi, Arkansas, and North Dakota.

The Supreme Court of the United States has ruled that the Free Exercise clause of the First Amendment applies to the states. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

"[T]he Supreme Court has recognized that government action may burden the free exercise of religion in two ways: by interfering with a believer's ability to observe the commands or practices of his faith, and by encroaching on the ability of a church to manage its internal affairs." *Gellington v. Christian Methodist Episcopal Church, Inc.*, 203 F.3d 1299, 1302 (11th Cir. 2000). The Church Carry Ban burdens free exercise in both ways. First, it interferes with the individual Plaintiffs' abilities to observe their faiths by requiring them to choose between two fundamental constitutional rights. Most faiths believe in regular attendance at places of worship, but the Church Carry Ban requires, under threat of a year's incarceration, that Plaintiffs abandon their inherent right to self defense through the most effective means available when Plaintiffs are observing their faith through attendance at a place of worship. Second, the Church Carry Ban also encroaches on the ability of a church to manage its internal affairs by restricting how a church may provide its internal security. Such restrictions are not imposed on other private property owners in the state. Outside of places of worship, other private property owners in Georgia may decide for themselves whether to permit firearms on the premises. Places of worship

may not govern their own property in this respect in Georgia.

It does not matter that the issues of church governance at hand are not based on matters of church doctrine or ecclesiastical law. "Legislation that regulates church administration, [or] the operation of the churches … prohibits the free exercise of religion." *Id.* at 1304, *citing Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 107 (1952).

The standard of review in Free Exercise cases is dependent on the nature of the law in question:

> [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. 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."

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993). Defendants have not argued that the Church Carry Ban is neutral and of general applicability. In fact, the State Defendants have conceded that the Church Carry Ban is a "blanket ban" on carrying weapons in places of worship. Doc. 10, p. 10. There can be no mistaking that the Church Carry Ban targets religion and religious

institutions. It has no applicability or counterpart in parks, banks, restaurants, retail stores, or office buildings.

"To determine the object of a law, we must begin with the text, for the minimum requirement of neutrality is that a law not discriminate on its face. ***A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context.***" *Id.* at 533 [Emphasis supplied]. In *Church of the Lukumi Babalu Aye*, the operative words in the ordinance at issue were "sacrifice" and "ritual," and the Supreme Court observed that those words had both secular and religious meanings, requiring additional analysis.

In the instant case, however, the analysis is easy. "Place of worship" is clear, unambiguous, and not susceptible of a secular meaning. A building or location for the special purpose of religious practice obviously refers to a religious practice without a secular purpose. The State of Georgia criminalizes otherwise lawful conduct[3] solely because it is taking place in a location specially used by people to practice their religions.

[3] Carrying firearms is prohibited in Georgia even with the property owner's permission only in seven other places besides "places of worship": government buildings, courthouses, jails and prisons, state mental health facilities, nuclear power facilities, polling places, and schools. O.C.G.A. § 16-11-127 (b) and O.C.G.A. § 16-11-127.1. Other than places of worship, and perhaps some nuclear power facilities, none of these

In order to pass constitutional muster, a statute must have as "its principle or primary effect … one that neither advances nor inhibits religion." *Board of Education v. Allen*, 392 U.S. 236, 243 (1968). Because the Church Carry Ban is pointed directly at religious institutions ("places of worship") and at no others, it serves no other purpose than to inhibit religion.

While it is true that Plaintiffs do not assert that their religious ***beliefs*** require them to carry guns to "places of worship,"[4] neutrality requires more than just non-interference with activities that are themselves religious:

> [T]he exercise of religion often involves not only belief and profession but the performance of … physical acts[such as] assembling with others for a worship service…. It would be true, we think, … that a State would be prohibiting the free exercise of religion if it sought to ban such acts only when they are engaged in for religious reasons.

Employment Division v. Smith, 494 U.S. 872, 878 (1990).

Applying this concept to the case at bar, Georgia punishes carrying firearms in places where people are assembling with others for a worship service, but there is no such punishment for carrying firearms in places where people work, shop, or recreate.

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locations are private property.

[4] Although there are certainly exceptions, such as the Sikh Kirpan (literally weapon of defense). *See, e.g., Gurdev Kaur Cheema v. Harold Thompson*, 67 F.3d 883 (9th Cir. 1995) (overturning ban on weapons in school as applied to Sikh child carrying the required Kirpan, with some narrowly tailored restrictions).

In other words, Georgia does not punish carrying a firearm in places where people assemble with others for secular purposes. Only a religious purpose to the assembly brings out the police power of the state. While the state may compel obedience to a "valid and neutral law of general applicability," (*Id.*, at 880), the law at issue is neither neutral nor generally applicable. The law is no more constitutional than would be a law prohibiting the wearing of black shoes to church when the general law said nothing about wearing black shoes out in public. It does not matter that wearing shoes is itself a secular activity and not required by the tenets of a religion. A secular activity that is restricted only when conducted in a religious context burdens the free exercise of religion. Such a law is not neutral. It burdens religiously motivated conduct while exempting the same conduct that is not religiously motivated.

"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 (3rd Cir. 2009). The Third Circuit also has interpreted *Church of Lukumi Babalu Aye* to mean that a law is not generally applicable "if it proscribes particular conduct only or primarily religiously motivated." *Tenafly Eruv Association v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002). While there may be some secular reasons why a

person would go to a place of worship, Defendants cannot reasonably dispute that going to a place of worship is primarily religiously motivated, and therefore the challenged Georgia law is not neutral.

"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." *McTernan*, 564 F.3d at 647. Defendants cannot possibly articulate a compelling government interest in burdening religion in this way. The policy of leaving worshippers defenseless against aggression or persecution is unconscionable. There can be no governmental interest in either burdening or favoring religion. Even if such an interest existed, disarming all who enter a place of worship, indiscriminately, is not a tailored measure at all, and certainly is not a narrowly tailored one.

Defendants make something of the fact that they have banned weapons in churches for 140 years, apparently believing that when they infringe on fundamental constitutional rights for a sufficient period of time, the rights cease to exist. There is, course, no such legal principle. Defendants also over look that the Jim Crow law to which they refer, Georgia's recently-repealed "public gathering" law, was much more akin to a neutral law of general applicability. The former O.C.G.A. § 16-11-127

banned carrying weapons "to or while at a public gathering," the later phrase vaguely-defined to include many locations where people may gather, including churches. The General Assembly repealed the arguably-neutral law with one that specifies the locations where a weapon may not be carried. Places of worship are one of the few places on such a list.

IB. The Church Carry Ban Infringes 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." The Supreme Court of the United States has declared the rights guaranteed by the Second Amendment to be fundamental. *District of Columbia v. Heller,* 128 S.Ct. 2783, 2798 (2008) ("By the time of the founding, the right to have arms had become fundamental…."). The *Heller* court also declared the right to keep ***and bear*** arms to be "an individual right to possess weapons in case of confrontation." *Id.* at 2797. The fundamental nature of the right, as it applies to the states, was reiterated by the Court in *McDonald v. City of Chicago,* 561 U.S. ___, Slip Opinion at 31 (June 28, 2010) ("In sum, it is clear that the framers and ratifiers of the Fourteenth Amendment counted the rights to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.")

The Supreme Court of the United States has not announced a standard of review for evaluating infringements on the Second Amendment, but it has declared that rational basis is not appropriate. *Heller*, 128 S.Ct. at 2818. The appropriate standard, therefore, is either intermediate scrutiny or strict scrutiny. Neither the 11th Circuit nor any other Circuit Court of Appeals has announced a standard of review for Second Amendment cases. Perhaps the most thorough discussion of the topic comes from the Third Circuit. In *United States v. Marzzarella*, 2010 U.S. App. LEXIS 15655, No. 09-3185 (3rd Cir., July 29, 2010). In *Marzzarella*, the Court discussed both the appropriate methodology for analyzing Second Amendment challenges to statutes and the standard of review:

> First, we ask whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee…. If it does, we evaluate the law under some form of means-end scrutiny. If the law passes muster under that standard, it is constitutional. If it fails, it is invalid.

2010 U.S. App. LEXIS 15655, 6.

The initial inquiry for the instant case, then, is whether carrying arms in places of worship is protected by the right to bear arms. *Marzzarella* instructs that the carrying of weapons of the kind commonly owned by law-abiding citizens is protected by the Second Amendment, with limited exceptions. 2010 U.S. App. LEXIS 15655,

9. The only conceivably-applicable exception, and the one raised by Defendants, is that carrying of weapons in "sensitive places" is not covered by the Second Amendment.

This is so because the right to bear arms as known at the Founding had been restricted from certain places at common law. For example, Queen Elizabeth I banned handguns within two miles of the monarch after William of Orange was assassinated with a handgun in 1584. Jamison, K.L., "Sensitive Areas," *Concealed Carry*, Volume 7, Aug/Sept 2010. The *Heller* Court stated in *dicta* that schools and government buildings are "sensitive places." Government buildings are no doubt the descendant of the location of the monarch. It is not clear how schools achieved "sensitive" status.

Defendants' logic for including churches in the "sensitive places" category is that all sensitive places have in common that they involve the exercise of a fundamental constitutional right. Defendants' argument fails for two reasons. First, the Supreme Court listed but two places that qualify as 'sensitive," government buildings and schools. Defendants assert that government buildings are places where people obtain redress of grievances. While this no doubt is true for ***some*** government buildings, Defendants fail to explain how it is true for ***all*** government buildings. The

other sensitive place mentioned in the *Heller* opinion is schools. There is no fundamental constitutional right to go to school, at least on the federal level that the Supreme Court would have been describing.

Second, the list of places that are "off-limits" in Georgia mostly includes places that do not involve exercise of a fundamental constitutional right. Defendants tried to gloss this over by mentioning only two places, the two that do happen to involve fundamental constitutional rights (places of worship and polling places). Examining the rest of the places off limits belies the invalidity of Defendants' argument. The only way for Defendants' logic to hold water is if there is a fundamental constitutional right to 1) go to prison (O.C.G.A. § 16-11-127(b)(3)); 2) go to a mental health facility (O.C.G.A. § 16-11-127(b)(5)); 3) go to a bar (O.C.G.A. § 16-11-127(b)(6)); or 4) go to a nuclear power plant (but not a power plant using any other fuel source) (O.C.G.A. § 16-11-127(b)(7)). The inescapable conclusion is that either Defendants' fundamental constitutional right test is invalid, or Defendants have made several places off-limits that are not "sensitive places," in violation of the 2nd Amendment.

Finally, Defendants have failed to explain why other places where fundamental constitutional rights are exercised are not off-limits to firearms. For example, newspaper offices, public squares, abortion clinics, and private homes all are places

where people go to exercise fundamental constitutional rights (freedom of the press, freedom of speech, right to privacy, and right to be left alone and to be free from unreasonable searches and seizures, respectively). None of these is an example, however, of a place where firearms are prohibited. Indeed, if *Heller* stands for any proposition at all it surely stands for the proposition that the state may not ban firearms in private homes. Given that *Marzzarella* observes, "prudence counsels caution when extending these recognized exceptions to novel regulations unmentioned by *Heller*," it is abundantly clear that Defendants' "fundamental rights" test for determining what is a sensitive place cannot stand.

Returning to the *Marzzarella* analysis, it is clear the right to carry firearms to places of worship is protected by the Second Amendment. *Marzzarrella* notes that the scope of the Second Amendment is what the right meant at the time of its ratification. Because the right to carry firearms in churches was not restricted (and was even required to be exercised) at the time of the Second Amendment's ratification, the right is within the scope of the Amendment. Given that Defendants urge application of intermediate scrutiny, it is clear they concede this point. For if the right were not protected by the Amendment, no level of scrutiny would be needed because the first half of the *Marzzarella* test would fail.

Marzzarella explains the process for determining which heightened level of scrutiny to apply (rational basis was rejected by *Heller*) by analyzing the Second Amendment similarly to the First Amendment. *Marzzarella* concludes that a law that severely limits the right must be subject to strict scrutiny, while a law that only affects possession of a narrow class of firearms is subject to intermediate scrutiny. The Court concluded that the District of Columbia's handgun ban in *Heller* would have been subject to strict scrutiny (if the Supreme Court had selected a standard), but the ban on obliterated serial numbers (at issue in *Marzzarella*) was subject only to intermediate scrutiny.

The Church Carry Ban obviously falls in between. It is not the total ban at issue in *Heller*, but neither is it the fairly benign regulation requiring serial numbers on firearms. In the continuum between these two guideposts, however, the Church Carry Ban is much closer to the *Heller* ban. The serial number requirement does not prohibit possession of firearms in any place, by any one, or of any functional type, as long as the firearm has a serial number. All modern firearms are manufactured with serial numbers, so if no one takes measures to obliterate the number, compliance is easy and happens as a matter of course.

On the other hand, the Church Carry Ban is a blanket ban of possession of

firearms in places of worship. If the home is a place of worship, presumably the Church Carry Ban applies in the home (just as the District of Columbia's ban did). In the case of Plaintiff Wilkinson, who lives in a Tabernacle-supplied parsonage and who routinely holds Tabernacle meetings in his home, his ability to keep a firearm in his home is highly suspect. Moreover, his office in the Tabernacle clearly is off limits. He thus is subject to a home and work place ban as a result of the Church Carry Ban.

Because the Church Carry Ban much more closely resembles the *Heller* ban than the *Marzzarella* ban, strict scrutiny applies. Even if the Court somehow concludes that intermediate scrutiny applies, however, the Church Carry Ban cannot withstand intermediate scrutiny, either.

Under intermediate scrutiny, Defendant's actions must "directly advance a substantial governmental interest and be no more extensive than is necessary to serve that interest." *Milavetz, Gallop & Milavetz, P.A. v. United States*, 176 L.Ed.2d 79, 94; 2010 U.S. LEXIS 2206, 36 (2010). The Church Carry Ban does not advance a governmental interest at all, let alone a substantial one. Defendants can have no interest in disarming and leaving defenseless citizens who choose to attend a place of worship.

Even assuming *arguendo* that the Church Carry Ban actually serves some

interest (by applying the illogical fiction that a disarmed person is safer than an armed person), a ***total ban*** on firearms in places of worship cannot possibly meet the test of being "no more extensive than is necessary to serve that interest." The law makes no provisions, for example, for firearms owned by the place of worship itself, or for employees of the place of worship. It has no exceptions for when church leaders might be counting cash from the day's contributions or leaving late at night in a dangerous neighborhood after locking the building. Instead, the law completely strips the place of worship -- private property as a matter of constitutional necessity -- of all control of its property with respect to firearms, and it strips all who worship and work there of their fundamental, inherent right to self defense in case of confrontation.

Under strict scrutiny, Defendants must show that their challenge law is narrowly tailored to advance a compelling governmental interest. *See McTernan* above. Defendants cannot make that showing. First, there is no governmental interest, compelling or otherwise, in regulating behavior in a place of worship when the behavior is "authorized" elsewhere in the state. Even if there somehow were such an interest, a blanket prohibition on the carrying of firearms cannot possibly be "narrowly tailored" in any sense of the phrase.

II. Plaintiffs Are Suffering Irreparable Harm

As shown in their Verified Complaint, Plaintiffs would like to exercise both their First and Second Amendment rights, but they are deterred from doing so because of the fear of arrest and prosecution. *See* Complaint, ¶¶ 14, 24, and 25. The presence of the Church Carry Ban thus has a chilling effect on Plaintiffs' exercise of their fundamental constitutional rights. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). "It is well settled that the loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury justifying the grant of a preliminary injunction." *Cate v. Oldham*, 707 F.2d 1176, 1188 (11th Cir. 1983), *citing Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981).

Conclusion

The Church Carry Ban infringes on Plaintiffs' First and Second Amendment rights. Those infringements are causing irreparable harm to Plaintiffs. Plaintiffs request a declaration that the Church Carry Ban infringes on their First and Second Amendment rights and an injunction preventing Defendants from enforcing the Church Carry Ban against them. In addition, Plaintiffs request an award of costs and attorneys' fees. Plaintiffs will file separate documentation of such costs and fees upon

the granting of this Motion for Summary Judgment.

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CERTIFICATE OF SERVICE

I certify that I filed the foregoing on September 21, 2010 using the ECF system, which will automatically send a copy via email to:

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