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.	)	

PLAINTIFF'S RESPONSE TO SUPPLEMENTAL BRIEF OF DEFENDANTS STATE OF GEORGIA AND GOVERNOR SONNY PERDUE IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

I. The State Concedes the Statute Applies to All "Places of Worship"

Although Plaintiffs never argued that the Church Carry Ban, O.C.G.A. § 16-11-127(b), is unconstitutionally vague, Defendants praise the law's clarity. Doc. 21, p. 2. Defendants concede that the Church Carry Ban is "simply broad" [Doc. 21, p. 3] and applies to "the entire building in which a religious congregation meets," [Doc. 21, p. 2], presumably to include private homes, revival tents in campgrounds, or any other place a congregation might care to meet. Based on Defendants' concession, the Tabernacle and its parsonage both qualify as "places of worship" by the Defendants' broad definition. Both sides agree there is no vagueness issue.

II. "Places of Worship" Are Not "Sensitive Places"

Defendants attempt to squeeze places of worship into the "sensitive places" described in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008). Defendants offer no explanation for why places of worship are supposedly "sensitive places" and support this dubious assertion only by explaining how ***other locations*** qualify as "sensitive." Doc. 21, p. 5. These other locations do not share any characteristics with places of worship. Defendants observe that jails, prisons, and nuclear power facilities are sensitive "based on the persons or materials situated there." *Id.* They inform this Court that mental health facilities and bars "contain persons whose judgment and inhibitions may be impaired." *Id.*[1]

Defendants make no attempt to explain how places of worship might fit into

[1] Defendants now concede that only half the places off-limits for firearms in Georgia are places where constitutional rights are exercised. *Id.* It appears that Defendants have abandoned the "exercise of fundamental constitutional rights test" upon which they previously relied. If they have not abandoned it, then they are advocating a three-pronged test for sensitive places: 1) wherever fundamental constitutional rights are exercised; 2) wherever dangerous people or substances are kept; and 3) wherever people have impaired judgment. Of course, the Supreme Court only named two places, schools and government buildings, that are presumptively sensitive, and schools do not fit into any of Defendants' three prongs. It is obvious that Defendants merely added two more prongs to their test when Plaintiffs pointed out that Defendants' sole original prong did not fit even half the places off-limits in Georgia. Defendants' two new prongs have no basis in *Heller*. They serve only to try to save Defendants' off-limits places from future attack.

either of Defendants' concerns. It is, of course, within judicial notice that places of worship do not present safety concerns because of housing criminals or thermonuclear material. Just as surely, Defendants cannot be arguing that people who attend places of worship have impaired judgment, as that would make it clear that Defendants are intending by their Church Carry Ban to discriminate against religious attendance, thereby inhibiting the free exercise of religion. The only logical conclusion is that places of worship do not qualify as "sensitive places" under *Heller*.

II. (1). Appropriate Level of Scrutiny for Second Amendment Claims

Plaintiffs already addressed the appropriate scrutiny to apply to Second Amendment challenges in their Motion for Summary Judgment, so they need not repeat those arguments here, other than to point out that they have demonstrated why strict scrutiny applies in a case where the regulation at issue severely restricts the right to bear arms.[2] Even if the Court agrees with Defendants that intermediate scrutiny should applies, because the law affects only "a narrow class of firearms" or for some other reason that other courts have used in applying the test to criminals, the Church Carry Ban fails constitutional muster. As explained more fully in Plaintiffs' Motion

2 As will be seen below, in Section V, the Church Carry Ban is a severe restriction. It constitutes at worst a blanket ban on exercise of the right at places of worship and at best a real threat of arrest and jail.

for Summary Judgment, the *Marzzarella* Court warned that "prudence counsels caution when extending these recognized exceptions to novel regulations unmentioned by *Heller.*" Doc. 20-2, p. 16. Defendants' eager leap to call places of worship "sensitive places" flies in the face of *Marzzarella's* warning.

Even if Defendants' dubious justification ("substantial interest") is to be accepted, that the Church Carry Ban somehow deters violence in places of worship, the Church Carry Ban is certainly more extensive than needed to accomplish the claimed "substantial government interest." *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 176 L.Ed.2d 79, 94; 2010 U.S. LEXIS 2206, 36 (2010) (Under intermediate scrutiny, the challenged statute must "be no more extensive than is necessary to serve that [substantial governmental] interest.") As will be seen below, there is already a law barring the vast majority of Georgians from carrying a weapon at all, and the law at issue in this case, the Church Carry Ban, affects only the small minority of worshipping Georgians holding a GWL.

III. The State Has No Special Interest In Keeping Firearms Out of Churches

Defendants contend that they have a substantial interest in "deterring and punishing violent crime and intimidation directed at religion." Doc. 21, p. 6. Defendants' argument betrays their fundamental misunderstanding of the firearms

regulation regime in place in Georgia. Even if Defendants' Church Carry Ban is struck down by this Court, it will still be illegal for any criminal to carry a weapon at a church, or anywhere else for that matter. With a few very limited exceptions, a person with a Georgia weapons license ("GWL") may not carry a weapon outside of his home, automobile, or place of business. O.C.G.A. § 16-11-126(h). A violation is punishable as a misdemeanor. O.C.G.A. § 16-11-126(i)(1). Repeat offenses are felonies, punishable by up to five years in prison. O.C.G.A. § 16-11-126(i)(2). On the other hand, the Church Carry Ban is a separate statute punishable only as a misdemeanor, regardless of the number of offenses. O.C.G.A. § 16-11-127(b). Thus, Defendants actually contend that the government interest in this case, compelling or substantial, is in "deterring and punishing violent crime and intimidation directed at religion" ***committed by Georgia Weapons License holders***, who are authorized to have weapons a few yards away in the parking lot. Doc. 21, p. 6. See O.C.G.A. § 16-11-127(d)(3). If the goal is merely deterring violence in places of worship by the public generally, then the least restrictive means would be to leave Section 126 in place while striking down 127(b)(4).

IV. Even Assuming an Interest, The Church Carry Ban Is Unrelated

In the context of the statutory scheme described above, an examination of

Defendants' claimed goals of the Church Carry Ban show them to be ***completely unrelated*** to the ban, much less substantially related (and certainly not necessary, if strict scrutiny is to apply). Plaintiffs have GWLs. Doc. 5, ¶¶ 17, 21, 23, 32. Plaintiffs are not seeking in this case to overturn O.C.G.A. § 16-11-126, so any relief afforded would apply only to the individual Plaintiffs and the members of institutional Plaintiffs that have GWLs (because everybody without a GWL is subject to the general prohibition of carrying weapons without GWLs). Defendants are asserting that GWL holders, the small fraction of the population that has submitted to three fingerprint-based criminal background checks and been determined by a probate judge to be law-abiding citizens of "good moral character" (*see* O.C.G.A. § 16-11-129(d)), must be deterred from committing violent crimes and intimidation directed at religion. In fact, the State characterizes Plaintiffs' stated desire to carry a weapon consistent with their religious beliefs the "first step in committing an offense." Doc. 21, p. 7. Defendants have presented no evidence of a GWL holder ***ever*** committing a violent crime or intimidation directed against religion, and Defendants fail to explain why a GWL holder, or anybody else, for that matter, would be deterred by a misdemeanor law from committing a violent capital felony. Defendants' argument defies logic.

In addition, the law specifically authorizes GWL holders to have weapons in the

parking lot. Therefore, if GWL holders are the murderous threat that Defendants make them out to be, their weapons are still readily available a short distance away. The law renders the weapons utterly useless, however, for the core purpose of the Second Amendment, which is self defense in case of confrontation.

V. There Is No Exception To the Church Carry Ban

Defendants attempt to downplay the impact of the Church Carry Ban by referring to what they call an "exception." In reality, there is no exception, and the provision to which Defendants refer does not have the effect that Defendants claim it does. Defendants refer the Court to O.C.G.A. § 16-11-127(d)(2), which states that the Church Carry Ban (and other off-limits prohibitions) 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 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….

Defendants' interpretation still burdens the exercise of religious rights, and the exception does not do what Defendants claim.

V. (1) Defendants' novel interpretation burdens the free exercise of religion

Defendants fail to mention that a person seeking the protection of 127(d) must

approach management or security upon arrival at the off-limits place and describe the provision as one of simply "permission" by management. This description is inaccurate and misleading. Subsection 127(d) is different from, for example, the prohibition against carrying a weapon in a bar, where the owner may give blanket permission for GWL holders to carry weapons. *See* O.C.G.A. § 16-11-127(b)(6). It also is different from the general rule (or rather lack thereof), where there is no requirement to seek affirmative permission from a private property owner generally before carrying a weapon onto the property. From this perspective, therefore, the provision, if the Court were inclined to accept Defendants' misleading characterization, still infringes on the free exercise of religion. A visitor to a shopping mall is not subject to the requirement to seek permission, but a visitor to a place of worship is. Therefore, the law is not neutral and generally applicable. It impermissibly burdens ***only*** those exercising their First Amendment rights. It is specifically aimed at worshippers, and Defendants concede as much.

V. (2) <u>Defendants' purported "exception" does not exist</u>

More importantly, Defendants read into the "exception" a provision that is not there. Defendants claim that the options explicitly listed in the provision (removing, securing, storing, or temporarily surrendering the weapon) somehow also "gives each

church the opportunity to decide for itself whether it will allow weapons in its building and how those weapons may be carried." Doc. 21, p. 7. The reader searches in vain for such language in 127(d). Defendants provide no explanation of how they made the quantum leap from removing, securing, storing, or surrendering to "just carry your weapon around."

In making this leap, Defendants overlook the maxim that the inclusion of some implies the exclusion of all others. "It is a well-established canon of statutory construction that the inclusion of one implies the exclusion of others." *Sturm Ruger & Co. v. City of Atlanta,* 253 Ga.App. 713, 721, 560 S.E.2d 525, 531 (2002). "By expressly authorizing local governments" to exercise one power, "the legislature impliedly preempted all other" powers. *Id.* "By expressly authorizing additional local regulation…in that limited instance, the Act impliedly preempts the City's regulation" outside of that instance." *City of Atlanta v. SWAN Consulting & Security Services, Inc.*, 274 Ga. 277, 553 S.E.2d 594 (2001).

Applying that maxim to the instant case, the General Assembly authorized church management and security to provide instructions for removing, storing, securing, and surrendering weapons. Nothing in the statute says that church management and security may deviate from that list and just give permission for a

churchgoer to carry a gun. Given that in the very same statute the General Assembly expressly gave such authority to bar owners, it is clear the General Assembly knew how to give that authority had it wished to do so, and the use of different words for places of worship makes clear that the General Assembly did not intend for church management to have the same authority as bar owners.

V. (3) The General Assembly rejected Defendants' purported exception

Perhaps the most conclusive evidence that the General Assembly did not intend to provide the authority to places of worship that Defendants claim it did is that ***the General Assembly considered and rejected just such a provision.*** The legislative history for the Church Carry Ban (in its present form) can be seen on the Georgia Senate's web site, at http://www.legis.state.ga.us/legis/2009_10/sum/sb308.htm. Senate Bill 308, signed by Perdue on June 4, 2010, was the bill that contained the Church Carry Ban. The legislative history at the link in the previous paragraph contains all the versions of the bill that were passed and amended throughout the session. The second version listed, "Committee sub LC 29 4230S," can be found at http://www.legis.state.ga.us/legis/2009_10/versions/sb308_Committee_sub_LC_29_4230S_4.htm. This is the version of SB 308 that was passed by the Senate Special Judiciary Committee. In that version, what became the Church Carry Ban said that a

weapon could not be carried

> [i]n a place of worship, ***unless the presiding official of the place of worship permits the carrying of weapons by all or designated license holders***.

[Emphasis supplied]. This language relating to permission in churches passed the full Senate. The emphasized language was not, as we know, in the final version of the bill, as it was amended out in the House of Representatives. The Senate committee version did, however, contain the purported "exception" language in (d)(2) that remained in the final version as passed and upon which Defendants now rely.

If the General Assembly had intended for church management to allow the carrying of weapons, it would have left the explicit language permitting it in the Church Carry Ban, just as it did for bar owners. Instead, the General Assembly removed it. The only reasonable conclusion is that the General Assembly intended to withhold from church management the very power that the General Assembly granted to bar owners: the power to allow people to carry guns on their premises. Thus, the alleged "exception" upon which Defendants rely simply does not exist.

V. (4) Defendants' purported affirmative defense still results in arrest

Even if this Court somehow concludes that the "exception" described by Defendants actually exists, the purported exception does not relieve Defendants of

liability. Defendants overlook that an "exception" to a criminal provision creates nothing more than an affirmative defense. "Where certain conduct is generally prohibited, but where a statutory exception permits the conduct under specified circumstances, the exception amounts to an affirmative defense." *Burchett v. State*, 283 Ga. App. 271, 273 (2007).

There is a crucial difference between an affirmative defense and an element of the offense. "The initial burden of producing evidence to support an affirmative defense rests upon the defendant charged with the offense." *Id.* Thus, every Plaintiff, including Plaintiff Wilkins, whom Defendants contend is essentially immune from the Church Carry Ban, is subject to the Church Carry Ban. An arresting officer is under no obligation to ascertain whether an affirmative defense exists. *See Patterson v. State*, 196 Ga. App. 754, 397 S.E.2d 38 (1990) (probable cause exists to arrest for gun offense without even asking about the affirmative defense).

Even if the alleged "exception" exists, Plaintiffs would be subject to arrest, being searched, handcuffed, and led away in front of their fellow church goers. Plaintiffs would be subject to being fingerprinted, photographed, and booked into jail, with an arrest record that would remain with them forever. If they were attending worship services on a weekend, when services are commonly held in most faiths,

Plaintiffs would still be sitting in jail on Monday morning, probably missing work and potentially their livelihood. They would have to hire criminal defense counsel. Only at their criminal trials, far down the road from the date of arrest, will they be in a position to raise, for the first time, their affirmative defense, and even then the burden of proof would be on Plaintiffs.

This situation offered by Defendants as a lifesaver for their unconstitutional law is a poor substitute for not being exposed to an unconstitutional law in the first place. Defendants' interpretation does not remove an impermissible and significant burden on the free exercise of First Amendment rights. At a minimum, arrest and prosecution has a significant chilling effect on Plaintiffs' civil rights.

VI. The Church Carry Ban Violates the Free Exercise Clause

As discussed more fully in Plaintiffs' original Response to Defendants' Motion to Dismiss [Doc. 12], which Plaintiffs re-assert here, the Church Carry Ban violates Plaintiffs' rights to be free from infringement of their free exercise of religion.

VI. (1) Defendants' law is admittedly not neutral or generally applicable

Defendants insist that free exercise challenges must involve a statute that "impermissibly burden[s] one of [a plaintiff's] sincerely held religious beliefs." Doc. 21, p. 10. 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. Strict scrutiny applies, and the law is unconstitutional unless it is narrowly tailored to further a compelling governmental interest:

> 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 not only concede that the Church Carry Ban is neither neutral nor generally applicable, they seem almost proud to argue the contrary. "Plaintiffs accurately state that Defendants have not argued that the Church Carry Ban is neutral and of general applicability…. Defendants fully acknowledge … that the Statute concerns only the possession of weapons in specific locations." Doc. 23, p. 7. Under First Amendment analysis, therefore, there is no burden test, and strict scrutiny applies to the Church Carry Ban. Defendants have made no effort to express a compelling

governmental interest. Neither have they shown how they have narrowly tailored the Church Carry Ban, instead arguing the contrary, that "it is simply broad." Doc. 21, p. 3. Because the Church Carry Ban is admittedly broad, it is not narrowly tailored and cannot withstand strict scrutiny. It is unconstitutional.

VI. (2) Defendants Rely on Matters Outside the Pleadings

It also should be noted here that Defendants impermissibly rely on matters outside the pleadings in their Motion to Dismiss. Under Fed.R.Civ.P. 12(d), the Court may not consider matters outside the pleadings when deciding a motion to dismiss, unless the Court gives the parties notice that the Court will proceed as though it were a motion for summary judgment. *See, e.g.*, *Harper v. Lawrence County,* 592 F.3d 1227, 1232 (11th Cir. 2010).

In its Supplemental Brief, Defendants point to Plaintiff's Brief in Support of their Motion for a Preliminary Injunction [Doc. 6-2] for the proposition that "Plaintiffs … insist only that they wish to take firearms to church for protection, a sincere—but secular—purpose." Doc. 21, p. 10. Defendants take great liberties with their citation, as the referenced document says nothing about the purpose for Plaintiffs to exercise their constitutional rights to keep and bear arms.

Moreover, Plaintiff Stone has filed a revised declaration since the Court's denial

of Plaintiffs' Motion for a Preliminary Injunction. Doc. 20-4. In his Declaration, Stone says:

> In very large part, my motivation to carry a firearm as a matter of habit derives from one of my Lord's last recorded statements at the "last supper," that "whoever has no sword is to sell his coat and buy one." Luke 22:36. I believe that this injunction requires me to obtain, keep, and carry a firearm wherever I happen to be. This includes when I am attending regular worship services, as is also my habit.

Doc. 20-4, ¶ 9. Thus, while Plaintiffs do not contend that their religious beliefs require them to carry firearms to places of worship specifically (which is what Defendants' citation to Plaintiff's Motion ***actually*** says), they do have religious beliefs inducing them to carry firearms generally wherever they go, ***including to places of worship.*** The Church Carry Ban burdens those beliefs.

Defendants also cite to an on-line encyclopedia as a source to rebut Plaintiffs' observation that Defendants' Church Carry Ban is rooted in Jim Crow. Plaintiffs made that observation in an aside in support of their Motion for a Preliminary Injunction, which the Court denied. It is unclear to Plaintiffs why Defendants are continuing to argue against a Motion upon which this Court already has ruled, and Defendants should not be citing to materials outside the pleadings in support of their Motion to Dismiss. Other than correctly noting that Plaintiffs' brief contained an obvious typographical error (placing the year of passage of Georgia's original Church

Carry Ban – as part of the Public Gathering Law -- at 1873 instead of 1870), Defendants fail to rebut Plaintiffs' underlying point that the public gathering law came on the heels of the Camilla Massacre. Even the online encyclopedia cited by Defendants discusses the Camilla Massacre just before the "Terry's Purge," in which only 24 whites were removed, that Defendants somehow find significant. In any event, after ratification of the Fifteenth Amendment by Georgia on February 2, 1870, "military rule" was removed on July 30 of that year after Congress readmitted Georgia to the union (the last state to be readmitted). The public gathering law was passed October 18. This law would have prevented the black Republican protestors at Camilla from carrying arms and defending themselves while permitting the very people who committed the massacre to be armed, thus ensuring political violence against members of minority groups and the return of Democrat majority rule in the next election and the resignation and flight of Governor Rufus Bullock. Suffice it to say that by pointing to the political situation in January of 1870 and claiming it for the entire year, Defendants significantly misrepresent the political situation existing in Georgia by the fall of 1870.

VII. Count 5 of the Amended Complaint States a Valid, Independent Claim

Defendants attack Count 5 of the Amended Complaint under a theory that it

does not state a different claim from the other counts. In support of this argument, Defendants assert that Plaintiffs "seek no new relief." Defendants are wrong. Count 5 of the Amended Complaint, alleging that a citizen or taxpayer may sue to prevent use of public funds for unconstitutional purposes, is very different from a direct attack on the constitutionality of a statute.

"[A] taxpayer has standing to contest the legality of the expenditure of public funds…." *Lowery v. McDuffie,* 269 Ga. 202, 203 (1998). In Count 5 of the instant case, Plaintiffs are suing Defendants to prevent them from using public funds to detain, search, arrest, and prosecute citizens for exercising their constitutional rights to bear arms. This is not, as Defendants maintain, a different argument for the same claim. An injunction issued pursuant to § 1983 is not the same as an injunction issued pursuant to state common law. Defendants offer no explanation of why they think a federal civil rights claim is identical to a state-law use of public funds claim.

VIII. The State of Georgia is not Immune from Plaintiffs' Claims

The State concedes that it voluntarily submitted to the jurisdiction of this Court when it removed this action from the Superior Court of Upson County. Doc. 21, p. 15. The State contends, nevertheless, that it has Eleventh Amendment immunity because it has sovereign immunity, and because it is not a "person" for purposes of 42

U.S.C. § 1983. Only Counts 2 and 4 of the Amended Complaint [Doc. 5] are § 1983 claims, and the State is ***not*** included in those counts. Thus, the State's argument on this point, while true, is inapplicable.

This leaves only the claim of sovereign immunity. The State cites only to cases addressing § 1983 (or other congressionally-created causes of action) as grounds for why the federal claims cannot be brought against the State. Again, Plaintiffs are not bringing any § 1983 or other federal claims against the State based on congressional acts. Plaintiffs are suing the State directly under the Constitution. The State is not a person under § 1983 and cannot be sued under that statute, but the State is subject to direct action under the Constitution because the constitutional provisions at issue in this case (rights guaranteed by the First and Second Amendments via the Fourteenth Amendment) apply to the State. C*antwell v. Connecticut*, 310 U.S. 296 (1940) (First Amendment); *McDonald v. City of Chicago,* 561 U.S. ___, Slip Opinion at 31 (June 28, 2010) (Second Amendment).

In a stunning display of circular logic, the State argues that Plaintiffs cannot bring a direct action against the State because there is an adequate alternate remedy. This argument follows the State's contention that Plaintiffs may not use the alternate remedy against the State because of sovereign immunity. The State cannot have it

both ways. Either Plaintiffs can sue the State under § 1983 or they cannot. It is clear they cannot, so there is no adequate remedy against the State except through a direct constitutional action.

The State asserts, without elaboration, that the State also is immune under Count 5 (the state law claim). Because the State has failed to elaborate on this contention, it can be considered abandoned. In the interest of being complete, however, the Supreme Court of Georgia has held, "The doctrine of sovereign immunity shields the state from suits seeking to recover damages. Sovereign immunity does not protect the state when it acts illegally and a party seeks ***only injunctive relief.***" *In the Interest of A.V.B.*, 267 Ga. 728 (1997). None of the Plaintiffs in this action are seeking ***damages*** from any of the Defendants, including the State. Plaintiffs are seeking only ***injunctive relief*** and thus the State has no sovereign immunity under Georgia law.

Conclusion

Defendants have failed to show that they are immune or that Plaintiffs have failed to state a claim. Instead, Defendants have conceded that the Church Carry Ban is broad (and therefore not narrowly tailored) and that it is not neutral and generally applicable. The Church Carry Ban is therefore subject to strict scrutiny, which it

cannot withstand. Defendants' Motion must be denied.

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CERTIFICATE OF SERVICE

I certify that I filed the foregoing on October 11, 2010 using the ECF system, which will automatically send a copy via email to:

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