Docket No. 11-10387

The United States
Court of Appeals
For
The Eleventh Circuit

GeorgiaCarry.Org, Inc., *et.al.*, Appellants
v.
State of Georgia, *et.al.*, Appellees

Appeal from the United States District Court
For
The Middle District of Georgia
The Hon. C. Ashley Royal, District Judge

Reply Brief of Appellants

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Summary of the Argument

Appellees State of Georgia (the "State"), Gov. Nathan Deal, Upson County, and Kyle Hood (collectively, "the Government") fail to make the crucial distinction in a Free Exercise case between laws that are neutral and generally applicable and laws that target religion. The instant case deals with the latter, and the Government (and the District Court) addresses only the former. Because the Ban on carrying firearms in "places of worship" applies only to places generally attended for religiously motivated reasons, and not to the state generally, the Ban targets religion and is subject to very strict scrutiny.

The Ban also violates the Second Amendment, regardless of whether the Ban is subject to intermediate scrutiny or strict scrutiny. The Government claims that the Ban furthers the important governmental objective of deterring crime, but fails to provide any explanation of how the ban accomplishes that objective. Appellants GeorgiaCarry.Org, Inc., the Baptist Tabernacle of Thomaston, Inc., Edward Stone, and Jonathan Wilkins (collectively "Plaintiffs") desire to exercise their rights to keep and bear arms in places of worship without committing any crimes, but they are deterred from doing so by the Ban. They are forced to choose between First

and Second Amendment rights, and the exercise of such rights is thereby chilled.

Finally, the State is not immune from this action. Plaintiffs are not suing the State under 42 U.S.C. § 1983, so the State's arguments against such a suit do not apply. The Supreme Court of Georgia has ruled that the State has no sovereign immunity in a case for injunctive relief such as this one.

Argument and Citations of Authority

1. The Ban is not Narrowed As the Government Suggests

The Government mischaracterizes the Ban by asserting that it is in fact much narrower than it actually is. According to the Government, the Ban "prohibits licensed weapon carriers from engaging in only two actions at places of worship: (1) they cannot carry a firearm into a place of worship that does not consent to that carriage; and (2) in a consenting place of worship, they cannot carry a firearm in an unsecured manner." Brief of Appellees, p. 7.[1]

In order to consider this argument, it is necessary to review the statutory language at issue:

> (b) A person shall be guilty of carrying a weapon or long gun in an unauthorized location and punished as for a misdemeanor when he or she carries a weapon or long gun while:
> (1) In a government building; (2) In a courthouse;
> (3) In a jail or prison;
> (4) In a place of worship;
> (5) In a state mental health facility as defined in Code Section 37-1-1 which admits individuals on an involuntary basis for

[1] This is a significant departure from the Government's original position in the District Court, where the Government referred to the Ban as a "blanket ban." R9-2, p. 20.

> treatment of mental illness, developmental disability, or addictive disease; provided, however, that carrying a weapon or long gun in such location in a manner in compliance with paragraph (3) of subsection (d) of this Code section shall not constitute a violation of this subsection;
>
> (6) In a bar, unless the owner of the bar permits the carrying of weapons or long guns by license holders;
>
> (7) On the premises of a nuclear power facility, except as provided in Code Section 16-11-127.2, and the punishment provisions of Code Section 16-11-127.2 shall supersede the punishment provisions of this Code section; or
>
> (8) Within 150 feet of any polling place, except as provided in subsection (i) of Code Section 21-2-413.
>
> . . .
>
> (d) Subsection (b) of this Code section shall not apply: . . . . (2) [t]o 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 . . . .

O.C.G.A. § 16-11-127 (emphasis added).

The Ban is a fairly straightforward statute, forbidding carrying firearms at a short list of locations, including places of worship. The Government, however, misinterprets the "Exception" language in subsection (d) at the end of the Code section. According to the Government, "[I]f the decisionmaker permits, a person licensed to carry a firearm may carry that

weapon in a place of worship so long as it is carried in a manner that reasonably falls within the meaning of the word 'secured.'" Brief of Appellees, p. 15.

There are several problems with the Government's interpretation of the Exception. First, nothing in the Exception makes mention of the possibility of "consent" to carry firearms in the prohibited places. The options are "removing, securing, storing, or temporarily surrendering" the firearm. Clearly, removing, storing, and surrendering are not consistent with carrying, so the Government focuses on "securing."

If the General Assembly had wanted to give management of all prohibited places the power to grant permission for license holders to carry firearms, it could have done so in clear and unambiguous language. One need look no further than the language making bars off limits, cited above as O.C.G.A. § 16-11-127(b)(6) ("In a bar, ***unless the owner of the bar permits the carrying of weapons or long guns by license holders***.") [emphasis supplied]. It would have been a simple matter for the General Assembly to use similar language for places of worship, but it chose not to do so.

Perhaps the most conclusive evidence that the General Assembly did not intend to provide the authority to places of worship that the Government claims it did is that ***the General Assembly considered and rejected just such***

a provision. The legislative history for the Ban 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 the governor on June 4, 2010, was the bill that contained the Ban. The legislative history includes 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 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, which explicitly gave management the power the Government now asserts, passed the full Senate. The emphasized language was not in the final version of the bill, as it was amended out in the House of Representatives. The Senate committee version also contained the purported Exception language in subsection (d)(2) that remained in the final version as passed and upon which the Government now relies.

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 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 the Government relies simply does not exist.

Second, the Government's interpretation of the statute leads to the counterintuitive result that there is no "ban" in Georgia for carrying a firearm in a jail, prison, courthouse, or government buildings. The same language that applies to places of worship applies to these locations as well. Any statements made by the Government about places of worship apply equally to, for example, maximum security prisons. So, for example, "[The statute] prohibits licensed weapon carriers from engaging in only two actions at [prisons]: (1) they cannot carry a firearm into a [prison] that does not consent to that carriage; and (2) in a consenting [prison] they cannot carry a firearm in an unsecured manner." [*See* Brief of Appellees, p. 7].

The Government, therefore, would have this Court believe that license holders are free to take their firearms into prisons and seek out the warden

(as the management of the prison) and follow the warden's instructions for removing, storing, securing, or temporarily surrendering the firearm. It is GCO's counsel's experience from visiting clients in prisons, especially maximum security facilities, that people routinely are arrested at prison entrances for having so much as a cellular telephone on their persons. It is absurd to believe the Government now concedes that a person who takes a gun to prison and asks to see the warden has a perfect defense to a prosecution for doing so, but he is criminally liable for possessing a mobile phone.

Third, the Government implies that the lack of consent of the management is an element of the crime. Brief of Appellees, p. 7 (License holders "cannot carry a firearm into a place of worship that does not consent to that carriage.") It is clear from the statutory language, however, that consent is an affirmative defense. *Burchett v. State,* 283 Ga. App. 271, 273 (2007). ("Where certain conduct is generally prohibited, but where a statutory exception permits the conduct under specified circumstances, the exception amounts to an affirmative defense.")

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. 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 churchgoers. 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.

The prosecution has the burden of proving guilt beyond a reasonable doubt, and this applies to every element of the crime. *Patterson v. New York*, 432 U.S. 197 (1977). But, where affirmative defenses are created through statutory exceptions, … the defendant has the burden of going forward with sufficient evidence to raise the exception as an issue." *Mckelvey v. United States*, 260 U.S. 353, 357 (1992). Because the

"Exception" is just such a statutory exception, the burden would be on the license holder to introduce sufficient evidence to show he had followed the requirements for the exception. Moreover, when raising an affirmative defense, the criminal defendant must admit the elements of the crime, except for intent. *Hicks v. State,* 287 Ga. 260, 261 (2010).

Thus, the "Exception" offered by the Government as a lifesaver from its unconstitutional law is a poor substitute for not being exposed to an unconstitutional law in the first place. The Government's 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.

A license holder, therefore, who meticulously follows the strictures of the Exception in the statute is nonetheless subject to arrest for carrying a firearm in a place of worship. The same license holder is not subject to arrest if he carries a firearm to banks, stores, restaurants, and office buildings. Plus, a person wishing to avail herself of the exception described by the Government must "approach[] security or management personnel upon arrival…" each and every time she attends a place of worship. Thus, even if the Court accepts the Government's interpretation of the Ban, the

fact remains that the Ban burdens carrying firearms to places of worship but does not similarly burden carrying firearms in most other areas of the state.

2. The Government Does Not Discuss the Ban's Targeting Religion

Plaintiffs have consistently highlighted the important distinction between 1) neutral laws of general applicability that happen to burden free exercise of religion and 2) laws that target religion for distinctive treatment. Just as consistently, the Government has ignored this distinction and concentrated only on neutral laws of general applicability.[2] The problem with the Government's tactic is that the two types of laws are subject to two different Free Exercise analyses, and the Ban falls squarely in the second type (i.e., it targets religion).

The Government asserts that "To plead a valid free exercise claim, a plaintiff must allege that the government has impermissibly burdened one of his sincerely held religious beliefs." Brief of Appellees, p. 16. Each case relied upon by the Government deals with a law that is neutral and generally applicable. The Government's asserted standard is correct for this type of law.

On the other hand, for laws that target religion, there is no "sincerely held religious belief" test. The law is subject to strict scrutiny, period:

[2] The District Court likewise concentrated on neutral laws of generally applicability and failed to address laws that target religion.

> [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). [emphasis supplied]

A simple example will help illustrate the logic for the distinct treatment given in the two different types of Free Exercise cases. Say a government passes a law forbidding parking on the odd-numbered side of the streets. Clearly, such a law is neutral towards religion and generally applicable. Say further that Temple X has an address of 101 Main Street. Because Temple X is on the odd-numbered side of the street, it is illegal under our hypothetical law to park on the street adjacent to Temple X. A worshipper at Temple X would not be successful in bringing a Free Exercise challenge to the law unless she had a sincerely held religious belief that required her to park on the street adjacent to the Temple.

For an example of the other type of Free Exercise case, say instead that the government passed a law forbidding parking on the street adjacent to places of worship. Such a law is not neutral and generally applicable. It is

not neutral towards religion because it specifically references "places of worship." It is not generally applicable because it only applies to certain places (rather than throughout the jurisdiction). In this instance, the same worshipper at Temple X would not be required to demonstrate that she had a sincerely held religious belief that required her to park adjacent to the temple. She could bring a successful Free Exercise challenge, unless the government could prove that the law is narrowly tailored to further a compelling governmental interest.

The flavor of strict scrutiny that applies to laws targeting religion is very strict indeed. "A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny. [It] must advance interests of the highest order…. A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases." *Lukumi*, 508 U.S. at 546.

Applying the foregoing concepts to the instant case, we clearly are dealing with a law that is not neutral and generally applicable. The Government concedes as much. Doc. 23, p. 7 ("Plaintiffs accurately state that Defendants have not argued that the Church Carry Ban is neutral and of general applicability…. Defendants fully acknowledge, as they always have,

that the Statute concerns only the possession of weapons in specific locations.")

Because the Ban is not neutral and generally applicable, the Government has the burden of proving that it is narrowly tailored to further a compelling governmental interest. Apparently confident in their position that the "sincerely held religious belief" test applies in all cases, the Government offered no such proof at all. The section of the Government's Brief devoted to the Free Exercise issue contains no mention of any governmental interest, much less a compelling one. Neither does it discuss how the Ban is narrowly tailored to further a governmental interest. For this reason alone, the Government must lose on the Free Exercise clause issue.

The Government's only explanation for the Ban (but offered in the Second Amendment context) is that the Government has an interest in deterring and punishing violent crime and "protecting" the free exercise of religion. Brief of Appellees, pp. 26-27. This explanation begs the question of how the Government can protect the free exercise of religion by burdening those who wish to engage in such free exercise. According to the Government, "By limiting the locations to which one may lawfully bring a weapon, the Statute deters gun violence." *Id.* at pp. 27-28. This *ipse dixit* is immediately suspect, as the Government fails to explain why those intent on

committing gun crimes (that generally are serious felonies, including capital murder) would be deterred by the enactment of a misdemeanor prohibiting carrying a gun. In addition, studies indicate that the presence of firearms has a deterrent effect on crime. *See,* generally, *More Guns Less Crime,* by John Lott, University of Chicago Press, 3rd Edition, May 24, 2010, ISBN 9780226493664.

"These *ipse dixits* do not explain why religion alone must bear the burden of the ordinances…." *Lukumi,* 508 U.S. at 544. There is no ban on carrying guns in banks, shops, restaurants, parks, and city sidewalks. If the Government actually has evidence that banning carrying guns reduces crime, then why does the Government limit its mischief to places of worship and a small number of other places? The Ban has "every appearance of a prohibition that society is prepared to impose upon [worshippers] but not upon itself. This precise evil is what the requirement of general applicability is designed to prevent." *Lukumi,* 508 U.S. at 545.

Even assuming, *arguendo,* however, that the Government were asserting that crime deterrence is a compelling governmental interest in the Free Exercise claim, the Ban still would fail. Where "[t]he proffered objectives are not pursued with respect to analogous nonreligious conduct, and those interests could be achieved by narrower ordinances that burdened

religion to a far less degree…the absence of narrow tailoring suffices to establish the invalidity of the [statute]." *Lukumi*, 508 U.S. at 546.

The governmental interest also is not compelling. "Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing … alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Lukumi*, 508 U.S. at 546. Because the Ban applies so narrowly (to places of worship and not to most of the state), the governmental interest of deterring crime by banning carrying firearms in but a select few places is not compelling.

3. The Ban Violates the Second Amendment

The Government goes to lengths to convince the Court that intermediate and not strict scrutiny applies to Plaintiffs' Second Amendment claims. Plaintiffs explained in its opening brief why strict scrutiny applies, and those arguments need not be repeated here. Moreover, given the clear failure of the Ban under First Amendment analysis, it is unlikely that this Court will be required to consider Plaintiffs' Second Amendment claims. Even if it does, however, the Government's suggested application of intermediate scrutiny is inappropriate.

The majority of the reported cases upon which the Government relies are cases where a person has been found (judicially) to have committed some wrong and as a result the person's right to bear arms has been eliminated. (Person subject to domestic protection order, *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010); person convicted of misdemeanor crime of domestic violence, *United States v. Skoien,* 614 F.3d 638 (7th Cir. 2010) (*en banc*); person convicted of misdemeanor crime of domestic violence, *United States v. Chester,* 628 F.3d 673 (4th Cir. 2010); convicted felon charged with "felon in possession", *United States v. Jones*, 673 F.Supp.2d 1347 (N.D.Ga. 2009).

The instant case is not one where such wrongdoing is in the mix. As license holders, Plaintiffs have been predetermined to be law-abiding citizens. To ban them from carrying firearms in locations that have not been determined to be "sensitive places"[3] is to confront directly Plaintiffs' rights to bear arms. Moreover, as will be shown below, the usefulness of the Ban (i.e., its substantial relationship or narrowly tailored relationship to an important/compelling governmental interest) is suspect.

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[3] While the Government attempts to claim that there is a fundamental right to bear arms only inside of one's own home [Brief of Appellees, p. 23, FN 13], it is plain from the Supreme Court's discussion of schools and government buildings as "sensitive places" that carry outside the home is being contemplated as well.

Even if intermediate scrutiny applies, the Ban fails to pass muster. To survive, the Ban must be substantially related to an important governmental interest. As noted earlier, the Government claims its important interests are deterring crime and protecting the free exercise of religion. They provide no evidence, however, that there is any relationship between the Ban and the interest, much less a substantial one.

The Government raises for the first time on appeal the argument that "the lack of a history of armed criminal activity at places of worship is an indicator of the efficacy of the Statute in preventing just such criminal activity." Brief of Appellees, p. 28. The Government has shown neither a "lack of history of armed criminal activity at places of worship" nor any causal relationship between the non-existent lack of history and the Ban.

The record contains nothing to indicate whether crimes involving firearms are more or less likely to occur at places of worship than any other place in Georgia. News reports certainly dispel the notion that there is a lack of history of ***any*** "armed criminal activity." [4]

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[4] *See, e.g.*, "Shooting Outside N. Georgia Church Leaves 1 Dead," http://www.news4jax.com/news/10812592/detail.html, Jacksonville News 4, January 22, 2007; "Man Critical After Shooting Outside Ga. Church," http://www.wrcbtv.com/Global/story.asp?S=13979328, Atlanta Eyewitness News, February 6, 2011; "Georgia Police Investigate Church Shooting," http://www.11alive.com/news/news_article.aspx?storyid=67025, Atlanta 11 Alive News, July 31, 2005; "Haynes Sentenced for Church Shooting,"

One of the most infamous church shootings in American history occurred in Georgia at a time when it was a crime not just to have a gun in a church, but also in the parking lot of a church. Alberta King, mother of civil rights leader Martin Luther King, Jr., was shot and killed on June 30, 1974, as she sat at the organ of the Ebenezer Baptist Church in Atlanta. For the Government to claim that there is a lack of history of armed criminal activity at places of worship simply is disingenuous.

It is likewise impossible to say that places of worship are hotbeds of criminal activity. There simply is no way of knowing based on the record in this case that places of worship are any different from other publicly-available places when it comes to crimes committed with firearms. This leaves us where we started: with no evidence from the Government that the Ban has any relationship with the governmental interest of deterring crime.

Moreover, the bare assertion that restricting the carriage of firearms reduces crime has no logical end to its reach. If banning firearms in places of worship reduces crime, then so would banning firearms in banks, shops, restaurants and parks, as well as on the city streets and sidewalks. Logically,

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http://www.southeastgeorgiatoday.com/index.php?option=com_content&task=view&id=191&Itemid=167, Southeast Georgia Today, August 22, 2008; "Georgia Church Shooting," http://www.wtvy.com/georgianews/headlines/38404334.html, Dothan, Alabama WTVY.

banning firearms in the home would reduce crime, too. In short, if one accepts the Government's position, then logically the Government can ban firearms ***altogether.*** We know from *Heller* and *McDonald*, however, that a complete ban is unconstitutional. If the Second Amendment rights include the right to carry arms except in "sensitive places" (which the Supreme Court identified only to be schools and government buildings), then the Government cannot just create more "off-limits" places on the grounds of deterring crime. To conclude otherwise would be to conclude that the Government may ban carrying firearms anywhere and everywhere.

The Government's other claimed interest is the protection of the free exercise of religion. The Government asserts that the Ban "assists the People to go to [places of worship] without fear of violence or intimidation." Brief of Appellees, p. 28. Once again, however, the Government relies on its unproven theory that restricting the carriage of firearms deters crime. ("By deterring violent crime that might be directed at religious institutions or their members, the Statute not only facilitates attendance, but also allows worshippers to focus on spiritual activities, many of which are inconsistent with protective vigilance.")

This is just more *ipse dixit.* As already discussed, the Government shows no relationship between crime rates and carrying guns. And, again as

already noted, at least one scholarly work concludes that carrying guns reduces crime. *More Guns Less Crime.* Moreover, the very existence of this litigation indicates that some worshippers do not believe their attendance has been facilitated by the Ban.

It is somewhat fantastic to believe that crime will disappear by preventing law-abiding citizens from carrying firearms. As a reminder, Georgia has a law that bans carrying firearms throughout most of the state unless the person has a Georgia weapons carry license ("GWL"). O.C.G.A. § 16-11-126. This neutral and generally applicable law applies, *inter alia,* in places of worship. While it may implicate the Second Amendment, the law requiring a license does not implicate the Free Exercise clause of the First Amendment (because it is neutral and generally applicable).

In order to obtain a GWL, an applicant must undergo three separate criminal background checks: a state check by the Georgia Crime Information Center; a national check by the National Instant Criminal Background Check system, and a national check by the National Crime Information Center. O.C.G.A. § 16-11-129(d). Two of those checks are based on fingerprints of the applicant. *Id.* An applicant is ineligible for a GWL if, *inter alia*, he is ineligible under federal law from possessing a firearm, if he is a convicted felon, if he has been convicted of a misdemeanor

crime of domestic violence, if he is a substance abuser, or if he has been convicted of any of several crimes involving firearms. O.C.G.A. § 16-11-129(b).

Because the general carry prohibition applies even in places of worship, people without GWLs cannot legally carry firearms in places of worship even without the Ban. Thus, the only people who are barred from carrying firearms in places of worship, solely on account of the Ban, are GWL holders. The Government fails to explain how crime is deterred by prohibiting licensed, law-abiding citizens from carrying firearms in places of worship. Neither does the Government explain how any worshippers are able to attend places of worship without fear of violence or intimidation by prohibiting GWL holders from carrying firearms. The Government introduced no evidence that ***anyone*** has been intimidated by a GWL holder carrying a firearm in a place of worship.

Finally, the Government makes much of the fact that the Ban has existed, in one form or another since 1870. The Government overlooks, however, that well before the Ban took effect, Colonial Georgia ***required*** worshippers to take firearms to their places of worship:

> Whereas it is necessary for the security and defence of this province from internal dangers and insurrections, that all persons resorting to places of public worship shall be obliged to carry fire arms.

> Be it enacted, that … every male white inhabitant of this province, … resorting, in any Sunday or other times, to any church or other place of divine worship… shall carry with him a gun, or a pair of pistols, in good order and fit for service, with at least six charges of gun-powder and ball, and shall take the said gun or pistols with him to the pew or seat,… under the penalty of ten shillings.
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> And … that the church [officials] … are hereby empowered to examine all such male persons… on Christmas and Easter days, and at least 12 other times in every year [and report offenders of the carry requirement so they may be charged] … and for neglect of such duty … forfeit and pay the sum of five pounds….

Colonial Records of Georgia, Volume XIX, Part 1, Act of February 27, 1770. Without a comparison of the results obtained from the two regimes (requiring and banning carrying guns to places of worship), it is impossible for the Government to say that its current practice actually has achieved the result it claims.

The Government also asserts that the "actual burden that the Statute places on any Second Amendment right … is not significant…." Brief of Appellees, p. 29. The Government's only support for this dubious argument is that there is no constitutional right to carry a firearm in an unsafe manner or against the wishes of the property owner. Given that Plaintiffs are arguing in support of neither proposition, the Government's straw man has been sufficiently attacked. The fact remains, however, that the Ban prohibits Plaintiffs from exercising their rights to keep and bear arms while at places

of worship. And, as noted earlier, even if the Government's interpretation of the Ban is correct, and permission to carry may be had from the place of worship, the issue of the affirmative defense versus an element of the crime continues to make the burden on bearing arms very real.

Even if the Court somehow concludes that the burden on the Second Amendment right is "light," as the Government argues, the lightness of the burden on a fundamental right does not, in and of itself, excuse the burden "under any level of scrutiny." The Government provides no support for this proposition, and there is none.

4. The State of Georgia is a Proper Defendant

The State argues that it is not a "person" under 42 U.S.C. § 1983 and therefore cannot be sued under that statute. While that argument generally is correct, it is immaterial to this case because Plaintiffs have not sued the State under 42 U.S.C. § 1983. The Amended Complaint [R5] contains five counts. Counts 2 and 4 are made under § 1983 and do not include the State. Counts 1 and 3 are made directly under the Constitution and do include the State. Count 5 is made under state law and also includes the State.

The State contends that it may not be sued directly under the Constitution, but it provides no support for that proposition. Instead, the State cites cases that do not hold that a state may be sued directly, and

incorrectly use the lack of such a holding to argue that a direct action is not permissible.

The State argues that direct actions under the Constitution are not allowed where § 1983 affords an adequate remedy. Again, while this might be true in the abstract, that principle does not apply with the State as a defendant. Because the State is not a "person" and cannot therefore be sued under § 1983, there is no remedy under § 1983 against the State. The State counters that because Plaintiffs may have a remedy against other defendants, it is not necessary that Plaintiffs have a remedy against every defendant. The State is assuming, without conceding, that Plaintiffs have a remedy against the other defendants. While Plaintiffs believe that they do, thus far in this litigation such a remedy has proved elusive. Moreover, it is impossible to say with certainty that at some point in this case a court will not determine that Plaintiffs have no standing to sue one or more of the other defendants, potentially leaving only the State as a defendant. It simply is not appropriate to dismiss one defendant because there is a possibility of a remedy against another defendant. It certainly cannot be the case that the State's sovereign immunity is dependent on the existence of a remedy against another defendant. Either the State has immunity, or it does not. In this case, it does not.

Even if Plaintiffs cannot sue the State directly under the Constitution, Count 5 of the Amended Complaint is a state law claim. Plaintiffs are suing the State based on the principle, established by the Supreme Court of Georgia, that citizens and taxpayers can sue to prevent use of public funds for illegal purposes. *Lowery v. McDuffie*, 269 Ga. 202, 203 (1998) ("[A] taxpayer has standing to contest the legality of the expenditure of public funds…."). In Count 5, Plaintiffs are contesting the legality of using public funds to enforce the Ban. Count 5 is therefore a state law issue.

The State next avers that is has sovereign immunity from all Plaintiffs' claims. In support of this defense, the State says, "The State has not consented to being sued under 42 U.S.C. § 1983." Brief of Appellees, p. 32. As already shown, this argument is not helpful, because Plaintiffs are not suing the State under § 1983.

Plaintiffs brought their three claims against the State in the Superior Court of Upson County, Georgia. The State removed the case to the District Court, thus submitting to the jurisdiction of that Court. Unless the State would have had immunity in the state court, it has no immunity in federal court. The Supreme Court of Georgia has ruled that the State has no sovereign immunity from suits for injunctive relief. *In the Interest of A.V.B.*, 267 Ga. 728 (1997). ("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.***") [emphasis supplied]. Because Plaintiffs are not seeking damages against the State, the State has no immunity.

As a final argument, the State claims the Supreme Court of Georgia "explicitly refused to address whether sovereign immunity would bar a suit based on the alleged violation of a constitutional right." Brief of Appellees, p. 33, *citing IBM v. Evans*, 265 Ga. 215, 217, FN 3 (1995). The State has taken liberties with its citation of *IBM*. In actuality, what FN 3 of that opinion says is, "Because sovereign immunity does not bar IBM's complaint [seeking an injunction], it is ***unnecessary*** to decide whether sovereign immunity would bar a suit based on the alleged violation of a constitutional right." [Emphasis supplied]. Refusing to address an issue and finding it unnecessary to do so are not the same thing. Plaintiffs are seeking injunctive relief, so their claims against the State are not barred by sovereign immunity.

Even if the District Court wanted to decline to exercise jurisdiction over Plaintiffs' state law claim, its proper course of action would have been to remand that claim to the Superior Court of Upson County.

Conclusion

Plaintiffs have shown that the Ban violates both their First and Second Amendment rights. The Ban targets religion and therefore fails as a matter of law unless the Government proves that it is narrowly tailored to further a compelling governmental interest. The Government has not attempted to prove such, so the Ban must be struck down. Regardless of the standard of review applied to Plaintiffs' Second Amendment challenge, the Ban fails. There is no governmental interest that is substantially related to the Ban. Finally, the State waived its 11th Amendment immunity by removing the case to federal court. The State has no sovereign immunity from suits for injunctive relief.

For the foregoing reasons, the judgment of the District Court should be reversed with instructions to grant Plaintiffs' motion for summary judgment and to deny the Government's motion to dismiss.

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Certificate of Compliance

I certify that this Reply Brief of Appellants complies with F.R.A.P. 32(a)(7)(B) length limitations, and that this Reply Brief of Appellants contains 6,470 words as determined by the word processing system used to create this Reply Brief of Appellants.

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Certificate of Service

I certify that I served a copy of the foregoing Reply Brief of Appellants via U.S. Mail on May 4, 2011 upon:

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