IN THE COURT OF APPEALS OF GEORGIA

JOHN KNOX ET.AL., Appellants,	)	
v.	)	Case No. A19A0962
NATHAN DEAL, GOVERNOR ET AL Respondents	)	

Brief of GeorgiaCarry.Org, Inc., *Amicus Curiae*

GeorgiaCarry.Org, Inc., *amicus curiae,* submits this Brief in support of neither party.

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Part One – Statement of *Amicus Curiae*

GeorgiaCarry.Org, Inc., as an *amicus curiae* ("GCO"), submits this Brief in support of neither party. GCO is a grass roots corporation organized under the laws of the State of Georgia. Its mission is to foster the rights of its members to keep and bear arms. In fulfillment of its mission, GCO engages in legislative advocacy, public interest research and education, and litigation. GCO frequently brings actions challenging laws or enforcement of laws regarding keeping and bearing arms, so it has an interest both in the subject of this case and of the procedural and pleading issues that gave rise to the dismissal of the case in the trial court.

GCO takes no position regarding the merits of the case, i.e., the constitutionality of the statutes at issue. GCO has experience in the issues of sovereign immunity, official immunity, and standing, because it frequently encounters those issues in its own cases. It therefore files this Brief only to aid the Court in navigating those subjects as they relate to the present case. GCO also has a case pending before this Court where sovereign immunity is

at issue (although GCO contends sovereign immunity was waived in that case), as well as official immunity and standing.[1]

[1] *GeorgiaCarry.Org, Inc. v. Bordeaux,* Case No. A19A0862.

Part Two – Proceedings Below

On September 25, 2017, Appellants, who are professors in the University System of Georgia (the "Professors") filed a complaint for declaratory and injunctive relief in the Superior Court of Fulton County against Gov. Deal and Atty. General Carr. The Professors seek to prevent enforcement of certain statutory provisions that combined have the effect of partially decriminalizing carrying certain firearms on University System of Georgia ("USG") property and preempting the Board of Regents ("BOR") from independently regulating the carrying of firearms on USG property. On August 9, 2018, the trial court dismissed the case on sovereign immunity, official immunity, and standing grounds. The Professors filed a Notice of Appeal on August 31, 2018.

Part Three – Argument and Citations of Authority

Summary of the Argument

The trial court dismissed the case on the grounds of sovereign immunity, official immunity, and standing. Based on established case law in Georgia on these topics, the trial court erred in finding that sovereign immunity and official immunity applied. On the other hand, the trial court

correctly ruled that the Professors lacked standing to bring their claims. This Court should therefore affirm solely on standing grounds and rule that sovereign immunity and official immunity do not apply.

Standard of Review

The appellate court reviews orders on questions of law *de novo*. *Mize v. First Citizens Bank and Trust Co., Inc.,* 297 Ga.App. 6 (2009) The appellate court reviews a trial court's grant of a motion to dismiss *de novo*. *Viola E. Buford Family Limited Partnership v. Britt,* 283 Ga.App. 676, 642 S.E.2d 383 (2007). A motion to dismiss may be granted only where a complaint shows with certainty that the plaintiff would not be entitled to relief under any state of facts that could be proven in support of his claim. *Id.*

1 – Sovereign Immunity

Sovereign immunity protects the state, its departments and officials (in their official capacities) from suits of all kinds, unless immunity has been waived by the legislature. *Fulton County v. Colon*, 730 S.E.2d 599 (Ct.App. 2012). Thus, ***if*** the professors had sued the Governor and Attorney General in their ***official capacities,*** there would be sovereign immunity, absent a

waiver.[2] Sovereign immunity does not apply, however, for state officials sued in their ***individual capacities***. *Georgia Department of Natural Resources v. Center for a Sustainable Coast,* 294 Ga. 593, 755 S.E.2d 184, 192 (2014) ("Our decision today does not mean that citizens aggrieved by the unlawful conduct of public officers are without recourse. It means only that they must seek relief against such officers ***in their individual capacities***. In some cases, qualified official immunity may limit the availability of such relief, ***but sovereign immunity generally will pose no bar.***") [Emphasis supplied].

Four years after *Sustainable Coast,* the Supreme Court clarified that official immunity does not apply when seeking only prospective relief:

> Read in its proper context, Article I, Section II, Paragraph IX(d) is most reasonably understood to be about suits and liabilities for retrospective relief, mostly monetary damages in tort cases.... Accordingly, the plaintiff...need not worry any longer that official immunity would bar a suit [seeking prospective relief only] if only it were brought against state officials in their individual capacities.

Lathrop v. Deal, 301 Ga. 408, 443-444, 801 S.E.2d 867, 891 (2017).

[2] There is no contention in this case that sovereign immunity has been waived.

Based on *Sustainable Coast* and *Lathrop,* it is clear that a plaintiff in the Professors' shoes, seeking to prevent the Governor and Attorney General from enforcing statutes on constitutional grounds, should sue them in their individual capacities. It is little surprise, then, that that is exactly what the Professors did. In the caption of the Complaint, each defendant is named "in his individual capacity, and his successors in office." In Paragraphs 52 and 53 of the Complaint, each defendant is described, concluding with "[Defendant] is sued in his individual capacity, as are his successors in office."

Despite the fact that the Professors ostensibly followed the requirements/suggestions of *Sustainable Coast* and *Lathrop,* the trial court concluded that sovereign immunity applied. In reaching this conclusion, the trial court ruled that the Professors were in fact suing the Governor and Attorney General in their official capacities. The trial court reasoned that the Governor and Attorney General have nothing to do with enforcement of statutes as individuals, but only as state officers. This reasoning misses the point in *Sustainable Coast* and *Lathrop,* and misapplies the meaning of "individual capacity" suits.

The Supreme Court has instructed plaintiffs to sue state officials in their individual capacities because when officials act contrary to the constitution, "the suit against such officer cannot be considered as one against the State, but the court will take jurisdiction of it as a suit against the officer as an individual acting without constitutional authority." *Holcombe v. Georgia Milk Producers Confederation,* 188 Ga. 353, 363, 3 S.E.2d 705 (1939). *See also Undercoffler v. Eastern Air Lines, Inc.,* 221 Ga. 824, 829, 147 S.E.2d 436 (1966) ("This suit comes within the well-established rule that a suit may be maintained against officers or agents personally, because, while claiming to act officially, they have committed or they threaten to commit wrong or injury … without right and authority…. [A] suit of this class is not a suit against the State.")

The trial court thus erred in *sua sponte* converting the Professors' claim from an individual capacity one to an official capacity one (i.e., a claim against the State). The trial court bolstered its reasoning by pointing out that the Professors claimed to be suing each Defendant's "successors in office." The trial court reasoned that a suit against successors in office ***must*** be an

official capacity suit, because, after all, successors in an office have nothing to do with the individual capacity of the people who currently hold the office.

Pretermitting whether, procedurally, successors in office can be sued in any capacity before such successors are even known, the trial court's reasoning is a continuation of the misapplication of individual capacity suit law. Consider, *arguendo,* that a state official is enforcing an unconstitutional statute. Under the *Holcombe-Undercoffler-Sustainable Coast-Lathrop* line of cases, it is proper to sue such official in his individual capacity. If, during the pendency of the action, the official leaves office and his successor continues the enforcement of the unconstitutional statute, obviously such successor could rightfully be substituted as a proper party defendant. While naming the unknown successor who has not taken office as an individual capacity plaintiff may be premature, it cannot be said that attempting to do so bolsters the logic that the case is really an official capacity case.

At some point, courts should take parties at their word. If a plaintiff says he is suing an official in the official's individual capacity, having the trial court change the case to one of official capacity, and then dismiss it because of sovereign immunity, does a disservice to the plaintiff. If there is no viable

individual capacity claim, because the complaint fails to state a claim for which relief may be granted (or because of lack of standing), then dismissal on those grounds would be appropriate. But a trial court should not construe a complaint to mean exactly the opposite of what the plaintiff stated, only to dismiss it on account of that construction.

In the present case, the Professors sued Governor Deal and AG Carr in their individual capacities, and the Professors' claims should be evaluated on that basis. Because sovereign immunity does not apply in individual capacity claims, it was error for the trial court to dismiss the claims on sovereign immunity grounds.

2. Official Immunity

Even though the trial court ruled that the Professors really were suing the Defendants in their official capacities, it also ruled that the claims in the Defendants' individual capacities were barred by official immunity. The trial court reasoned that because Gov. Deal and AG Carr act in a discretionary fashion in enforcing the statutes at issued, official immunity applies.

The trial court relied on *Lathrop,* cited above, for the proposition that discretionary acts performed by public officials are immune from suit, absent

willfulness, malice, or corruption. 301 Ga. at 436. What the trial court overlooked, however, is that *Lathrop* makes clear that this rule applies to actions for damages only. Even the quotation from *Lathrop* cited by the trial court twice makes reference to an action "for damages." *Id.* *Lathrop* goes on to note:

> Given the purpose of the [official immunity] doctrine as a matter of decisional law, it is unsurprising that it appears to have been limited to cases in which a public officer was sued in his individual capacity for monetary damages or other retrospective relief.... [A] case against a public officer personally for prospective injunctive relief is of an entirely different character from a claim against him personally for monetary damages.
> ...
> This understanding is consistent with the understanding in American law generally that the personal immunities of public officers typically do not extend to prospective relief.
> ...

Id. at 436-437.

It is noteworthy that Gov. Deal, the lead defendant in *Lathrop,* argued that official immunity, as included in the state Constitution in Article I, Section II, Paragraph IX(d), gives him official immunity in his individual capacity even for injunctive and declaratory relief. *Id.* at 439. But the Supreme Court rejected that reading:

> Read in its proper context, Article I, Section II, Paragraph IX(d) is most reasonably understood to be about suits and liabilities for retrospective relief, mostly monetary damages in tort cases.... We conclude that Article I, Section II, Paragraph IX(d) concerns suits and liabilities of public officers for monetary damages and other retrospective relief. ***It does not limit the availability of prospective relief.***

Id. at 444 [emphasis supplied].

Applying the binding precedent of *Lathrop* to the present case, the Professors sought only prospective relief.[3] Even if the Professors also sought retrospective relief, the trial court erred in dismissing the prospective relief claims on the grounds of official immunity. Official immunity clearly does not apply to such claims.

3. Standing

The trial court also dismissed the Professors' claims for lack of standing. In this respect, the trial court's decision was correct. In order to

[3] The Professors did request their litigation expenses and attorney's fees in their Complaint. They do not reference the legal authority under which they seek attorney's fees. To the extent they seek attorney's fees as damages, official immunity may apply. If attorney's fees are sought as a litigation expense pursuant to a cost-shifting statute, official immunity generally would not apply. Either way, however, the Professors' claims for declaratory and injunctive relief are not barred by official immunity and it was error for the trial court to have dismissed such claims on that basis.

evaluate standing, however, it is necessary to examine more closely the issues in the case and how they relate to the Professors.

The Professors complain that the combination of two statutes, O.C.G.A. §§ 16-11-127.1 and 16-11-173 unconstitutionally deprive the Board of Regents ("BOR") of its power to regulate activities on USG property. O.C.G.A. § 16-11-173, says, in pertinent part, "[N]o … board … or authority of this state, other than the General Assembly, … shall regulate in any manner … [t]he possession [or] carrying … of firearms…." This statute has existed in Georgia for over 20 years, with the addition of "board" and "authority of the state" in 2014. Ga.L. 2014, p. 599 (HB 60).

O.C.G.A. § 16-11-127.1 is the provision in Georgia law partially criminalizing carrying weapons, including firearms, on school property. Prior to the 2017 changes to the statute that precipitated the present case, it was generally prohibited to carry a firearm on college campuses, including USG property. There were, however, many, many exceptions to this general prohibition.

O.C.G.A. § 16-11-130 provides exemptions to O.C.G.A. §§ 16-11-126 through 16-11-127.2 to many classifications of people. Everyone who falls

into one of those classifications is completely exempt from the prohibitions of O.C.G.A. § 16-11-127.1 and is therefore not prohibited from carrying firearms or any other weapons on college campuses. The list of classifications in O.C.G.A. § 16-11-130 is quite long: peace officers and retired peace officers of any state, corrections wardens and jailers, people in the military service of the State or the United States; district attorneys, their deputies, and their investigators, State Court solicitors and their deputies, State Board of Pardons and Paroles employees, the Attorney General and his authorized employees, probation officers, public safety directors, explosive ordinance technicians, state and federal judges and retired judges, U.S. Attorneys and their assistants, county medical examiners and coroners, clerks of superior courts, and constables.

There are nearly 1.3 million members of the U.S. armed forces.[4] There are nearly 800,000 peace officers in the United States.[5] When the thousands of others on the exempt list are added in, one easily concludes that somewhere between 2 and 3 million people were not prohibited from

[4] https://en.wikipedia.org/wiki/United_States_Armed_Forces

[5] https://en.wikipedia.org/wiki/Law_enforcement_in_the_United_States

carrying any weapons, including firearms, on USG property before the instant issue arose. In addition, O.C.G.A. § 16-11-127.1 contained several exceptions for people with Georgia weapons carry licenses ("GWLs") to carry firearms on USG property, most notably in their cars and when picking up or dropping off students. Based on compilations of numbers of GWL applications processed each year by the probate judges in this state, GCO estimates that there are approximately 1 million GWL holders in Georgia. Thus, in addition to the perhaps 3 million people who were completely exempt from prohibitions on carrying firearms on USG property, another 1 million were sometimes exempt.

In 2017, the General Assembly passed HB 280, which partially decriminalized carrying concealed handguns on public college campuses, including USG property, by GWL holders. That is, of the 1 million people who were occasionally exempt, the same 1 million people gained additional, but still not complete, exemptions. HB 280 did not allow a single additional person to carry a firearm on USG property. It merely expanded exemptions for GWL holders that already had partial exemptions.

As noted in the trial court order, the BOR did not reject HB 280 or claim that its constitutional authority preempted the preemption of O.C.G.A. § 16-11-173. Instead, the BOR appears to accept that it lacks the power to regulate carrying weapons on its property, and that the decriminalization/expanded exemption for GWL holders of HB 280 is in effect. Indeed, the BOR circulated a memo to members of the USG community implementing the provisions of HB 280.

Against the foregoing backdrop, we turn to the Professors' standing to bring the present case.

As a general rule, a litigant has standing the challenge the constitutionality of a law only if the law has an adverse impact on that litigant's own rights. *Feminist Women's Health Center v. Burgess,* 282 Ga. 433, 434, 651 S.E.2d 36 (2007). There is an exception for "third party standing" if 1) the litigant has suffered an injury in fact; 2) the litigant has a close relationship to the third party whose constitutional rights have been violated; and 3) there is some hindrance to the third party's ability to protect its own interests. *Id., citing Powers v. Ohio,* 499 U.S. 400, 411, 111 S.Ct. 1364 (1991).

Applying this test to the present case, even assuming *arguendo* that the second prong is met, it is difficult to find so for the first and third prongs. The Professors all claim as their "injury" some variation on the loss of the power to ban guns in their classrooms. Pretermitting whether they ever had that power, they only could have derived it from and through the power of the BOR. By implementing O.C.G.A. §§ 16-11-127.1 and 16-11-173, however, the BOR has taken away that power (to the extent it ever granted the power to the Professors in the first place). Any injury suffered by the Professors, then, is at the hands of the BOR.

The Professors' complaint in reality is that they are less happy with their work environments than they used to be. They fail to explain, however, how dissatisfaction with work constitutes an injury, let alone how that injury can be traced to the Governor and the Attorney General. Changing working conditions are common, and they do not normally become the basis of litigation. This is especially true in cases such as the present one, where the change is not central to the work function.

Perhaps more obviously, though, the Professors cannot seriously claim to meet the 3rd prong. The BOR is not hindered in any way from asserting its

powers if it chooses to do so. If the BOR believes the General Assembly has usurped BOR power, the BOR is free to seek appropriate relief.

In reality, the Professors are dissatisfied that the BOR has not protected its own interests by bringing this case itself. The Professors' recourse is with their own employer: the BOR. If they cannot convince the BOR to protect its own interests, they lack standing to step in and take action essentially on the BOR's behalf.

CONCLUSION

The trial court erred in finding that sovereign immunity and official immunity apply in this case. The trial court concluded correctly that the Professors lack standing. This Court should affirm the judgment of the trial court on standing grounds only, and make clear that the dismissal of this case on sovereign immunity and official immunity grounds was erroneous.

This submission does not exceed the word count limit imposed by Rule 24.

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