In the United States District Court
For the Northern District of Georgia
Gainesville Division

BRADY CENTER TO PREVENT GUN VIOLENCE,	)	
Plaintiff	)	Civil Action File No.
v.	)	2:13-CV-104
CITY OF NELSON, GEORGIA, *et.al.*, Defendants	)	

BRIEF IN SUPPORT OF INTERVENOR'S MOTION TO DISMISS

Introduction

Pursuant to Fed.R.Civ.Proc. 24(c), Intervenor is filing this Brief in Support of its Motion to Dismiss as an accompaniment to its Motion to Intervene. Intervenor moves to dismiss pursuant to Fed.R.Civ.Proc. 12(b)(1) and 12(b)(6). Intervenor will show that Plaintiff utterly lacks any semblance of standing to bring his case and thus this Court has no jurisdiction to proceed. Intervenor will further show that Plaintiff has failed to state a claim for which relief may be granted.

Argument

I. Plaintiff Lacks Standing

Article III, Section 2 of the Constitution limits the jurisdiction of the federal courts to "cases" and "controversies." Courts do not render advisory opinions. "The party invoking federal jurisdiction bears the burden of proving standing." *Bischoff v. Osceola County Florida*, 222 F.3d 874, 878 (11th Cir. 2000), *citing* *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an injury in fact – an invasion of a legally-protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. Third, it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision. The party invoking federal jurisdiction bears the burden of establishing these three elements.

Lujan, 504 U.S. at 560-561 (internal citations and quotation marks omitted). Intervenor will discuss each element in turn.

I.A. Plaintiff Has Suffered No Injury

Plaintiff doe s not claim to have suffered an injury itself. Instead, it claims that one of its members, Harold Kellett, has suffered injuries. The injuries Plaintiff alleges for Kellett are 1) having to purchase a handgun and ammunition, costing Kellett the price of the two; and 2) depreciation of Kellett's property. In other

words, the injuries alleged to Kellet are unique to Kellett (i.e., the price of his gun and ammunition and the decrease in his property value).

While an organization such as Plaintiff can sometimes claim standing solely because of injury to its members, Plaintiff cannot do so in the instant case. In order for an organization to have standing via its members, 1) its members must have standing to sue in their own right; 2) the interest the organization seeks to protect must be germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested must require the participation of the individual members. *Hunt v. Washington State Apple Growers Association*, 432 U.S. 333, 343 (1977).

Plaintiff lacks standing for multiple reasons. First, Kellett does not have standing.[1] The Ordinance on its face applies only to "heads of households." Plaintiff does not even allege that Kellest is a "head of household," and in fact expresses doubt as to the meaning of "head of household." If Kellett is not a "head of household," then the Ordinance does not apply to him and he has not been injured.

[1] Intervenor notes that Kellett is the only member Plaintiff mentions by name and the only member Plaintiff says actually lives in the City of Nelson. Plaintiff alleges in its Complaint that other members live in the "Nelson area," but do not allege any other members live in Nelson.

I.B. Kellett's Participation is Necessary

Even assuming *arguendo* that Kellett would have standing if he were a plaintiff (which he is not), Plaintiff still does not have standing. Kellett's arguable standing is solely economic in nature. He has purchased the gun and ammunition and his property value has declined (according to Plaintiff). While Kellett's alleged injury would be redressable, it is redressable in the form of special damages. That is, it is redressable via special damages to him. This is where Plaintiff's putative standing falls yet again. Plaintiff has sought no damages, but even if it did, because the damages are unique to Kellett, Kellett's participation is necessarily required. Plaintiff cannot have organizational standing where participation of its members is necessary.

I.C. Kellett Must be Head of Household or Non-Head of Household

Plaintiff does not allege whether the single member through which Plaintiff claims standing, Kellett, is a Head of Household or a Non-Head of Household. The economic injuries alleged for Kellett (purchasing a firearm and ammunition) only make sense if he is a Head of Household. Yet, Plaintiff's Equal Protection Claim is that Non-Heads of Households are injured. Assuming as Plaintiff has that being a Head of Household or Non-Head of Household is a binary status, Kellett is

one or the other but not both. Kellett, and through him Plaintiff, will have to abandon one claim or the other, as standing could not be present for both.

Lastly, it is not at all clear that this case is germane to Plaintiff's purpose. Plaintiff alleges that its purpose is "to reduce gun deaths and injuries through education, research, and legal advocacy." Plaintiff does not allege that this case will impact gun deaths and injuries. Plaintiff does allege that there is some correlation between gun deaths and gun ownership, but it does not allege that this case will impact gun ownership or gun deaths.

Because Plaintiff lacks standing, this Court lacks jurisdiction and must dismiss the case pursuant to Fed.R.Civ.Proc. 12(b)(1).

II. Plaintiff Has Failed to State a Claim for Which Relief May be Granted

Even if this Court determines that Plaintiff has standing, Plaintiff has failed to state a claim for which relief may be granted. Plaintiff has alleged four counts in its Complaint: Second Amendment, Right to Privacy, First Amendment, and Equal Protection. Intervenor will discuss each one in turn.

I.A. The Second Amendment Permits Requirements to Arm

Plaintiff first claims that Nelson's Ordinance requiring heads of households to arm themselves violates the Second Amendment. This claim turns the Second Amendment on its head. The Second Amendment reads, "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 has ruled that the Second Amendment guarantees an individual right to keep and bear arms, *District of Columbia v. Heller*, 554 U.S. 570 (2008), and that the provisions of the Second Amendment apply to the states via the Fourteenth Amendment, *McDonald v. City of Chicago*, 130 S.Ct. 3020 (2010).

Plaintiff has made the unique and unprecedented claim that the a person may decide the best way to exercise the Second Amendment is by ***not*** keeping and bearing arms. Doc. 1, ¶ 43. Plaintiff supports this notion by saying, "The Second Amendment right does not authorize the government to force an individual to purchase a firearm for self-defense in the home." *Id.* Of course the foregoing is a true (but irrelevant) statement, because none of the amendments contained in the Bill of Rights ***authorize*** the government to do anything. The Bill of Rights restricts government action. It does not enable it.

The real question, then, is whether the Second Amendment restricts Nelson from passing the Ordinance.[2] For an understanding of what the Framers intended when they wrote the Second Amendment, it is helpful to examine their contemporaneous acts. The Second Amendment in its final form was passed by Congress on September 21, 1789 and ratified by the states on December 15, 1791.

[2] Intervenor takes no position on the desirability of the Ordinance from a public policy perspective. That question rests with the Nelson City Council.

Journal o f the House of Representatives, Vol. 1, p. 305. Merely 5 months later, on May 8, 1792, Congress passed the first Militia Act. The Act required:

> [E]ach and every free able-bodied while male citizen … shall severally and respectively be enrolled in the militia [and] shall … provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch with a box therein to contain not less than twenty-four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball; or with a good rifle, knapsack, shot-pouch and powder-horn, twenty balls suited to the bore of his rifle, and a quarter pound of powder….

Second Militia Act of 1792, Sess. 1, ch. 33, 1 Stat. 271.

Intervenor can find no cases where anyone challenged the constitutionality of this Act, passed while the ink on the Second Amendment was still wet. Here in Georgia, the history of compulsory possession ***and carrying*** of firearms has even deeper roots. As early as 1770, Colonial Georgia required gun possession in church:

> 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.
>
> 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.

Intervenors cannot find any authority supporting Plaintiff's position that the Second Amendment actually bans requirements to possess firearms. Given the rich history in this country of just the opposite, even with the Framers, it is difficult to envision such a ban contained within the Second Amendment.

II.B. The Ordinance Does Not Violate the Right to Privacy

Plaintiff next claims the 14th Amendment's implicit right to privacy somehow prohibits the Ordinance. Plaintiff's claim is that the right to privacy is invaded by a requirement to have a firearm in one's home. This claim fails for multiple reasons. First, the Ordinance does not specify how or where the firearm is to be stored. The Ordinance does not even say the firearm must be in the home. Moreover, government regulations pervasively require one's home to contain sundry items. Building codes require certain plumbing and electrical fixtures and infrastructure for a home to be inhabited. Laws require smoke detectors in dwellings. Tax laws require maintenance of certain records, presumably kept in the home. The bare requirement to possess an item, even if in the home, can hardly be an invasion of privacy. This is especially true in the light of longstanding requirements in this country to possess firearms.

Plaintiff calls the requirement to have a firearm a continuing violation of Kellett's right to privacy by forcing him to bring into his home an unwanted

firearm. Plaintiff does not allege that Kellett does not want a firearm in his home. Plaintiff only alleges that. Kellett would not have purchased a firearm but for the Ordinance. Now that Kellett has a firearm however, Plaintiff does not allege that Kellett would like to divest himself of the firearm. Moreover, Plaintiff alleges that Kellett has an antique firearm in his home, so it hardly is true that Kellett desires not to have any firearms in his home.

II.C. The Ordinance Does Not Require Statements of Exemption

Plaintiff next claims Kellett's free speech rights have been violated by requiring him to choose between purchasing a firearm and "professing" one of the exemptions (disability, poverty, conscientious opposition, or felony conviction). Plaintiff ignores, however, that the Ordinance requires no such choice. Assuming *arguendo* that the Ordinance even will be enforced, nothing in the Ordinance requires individual heads of households to proclaim how they are complying (either through maintenance of a firearm or via an exemption. Moreover, Plaintiff has alleged that Kellet has complied with the ordinance by purchasing a firearm. Kellett therefore has no reason to have to "impugn [his]own mental abilities, stigmatize [himself] as impoverished, or profess to having beliefs, including religious beliefs, different from other members of the [his] community. In short, by complying with the Ordinance via purchase of a firearm any First Amendment injury that Kellett ***might*** have suffered has been made moot.

II.D. There is No Equal Protection Claim

Plaintiff next claims an equal protection injury. To set up this claim, Plaintiff defines two classes of individuals: Heads of Households and Non-Heads of Households .[3] Under Plaintiff's theory, Non-Heads of Households are injured because they do not have a say in whether they maintain a firearm. The problem with this claim is that Non-Heads of Households are not required by the Ordinance to maintain a firearm. Only Heads of Households are so required.

Because the Ordinance imposes no duty on Non-Heads of Households, they are not obligated to do anything and cannot be injured by the Ordinance. Plaintiff claims the odd theory that if a Head of Household is married to a Non-Head of Household, "joint household funds" are diverted from the Non-Head of Household's use to comply with the Ordinance. Plaintiff makes no allegations of that it or Kellett have this issue. Plaintiff makes no claim that "joint household funds" is a federally protected status. Georgia is not a community property state, so there is no reason to believe the funds of a married Head of Household are jointly owned by the spouse Non-Head of Household. This entire claim is prely

[3] As Noted in Part I above, Plaintiff does not allege whether the single member through which Plaintiff claims standing is a Head of Household or a Non-Head of Household. The economic injuries alleged for Kellett (purchasing a firearm and ammunition) only make sense if he is a Head of Household. Yet, Plaintiff's Equal Protection Claim is that Non-Heads of Households are injured. Assuming as Plaintiff has that being a Head of Household or Non-Head of Household is a binary status, Kellett is one or the other but not both. Kellett, and through him Plaintiff, will have to abandon one claim or the other.

conjectural and not related to any injury alleged to have been suffered by Kellett or any other member of Plaintiff.

In reality, the requirement that a spouse pay a fee that the other spouse must not pay is common. What if, for example, a husband gets a speeding ticket and is fined. The wife has no say in the payment, did not speed, and her "household funds" are diverted. Does she have an equal protection claim? Hardly.

II.E. Plaintiff Does Not Allege Enforcement of the Ordinance

Plaintiff's claim boils down to a single member's dissatisfaction with the Ordinance, but with no indication that the Ordinance ever will be enforced. Plaintiff does not allege that it or Kellett or any other member ever have been told they are subject to punishment or even threatened with enforcement.

Plaintiff claims that the Ordinance is enforceable via a general penalty provision, but a closer inspection of Nelson's Code shows that not to be the case. Plaintiff cites Chapter 1, Section 1-11 as applying to the Ordinance, and imposing a penalty of $1,000 fine. Chapter 1, Section 1-11 says:

> Whenever in this Code or in any ordinance of the city any act is prohibited or is made or declared to be unlawful or an offense, or whenever in this Code or any ordinance the doing of any act is required ***and the failure to do such act is declared to be unlawful***, and no specific penalty is provided; and unless otherwise provided by state law, the violation of any such provision of this Code or any such ordinance shall be punished by a fine not to exceed $1,000.00 ….

[Emphasis supplied]. As the emphasized language requires, in order for the penalty provision to apply, the failure to do an act must be declared in the applicable ordinance to be unlawful. Nothing in the Ordinance declares failure to comply to be unlawful. That is, the Ordinance has no teeth and cannot be effectively enforced against anyone. Because the Ordinance is unenforceable, no one can claim any injury on account of it and no one can obtain relief from it.

Conclusion

Intervenor has shown that Plaintiff has no standing, that the ordinance is not capable of enforcement, and Plaintiff has failed to state a claim for which relief may be granted. For these reasons, Plaintiff's claim must be dismissed.

/s/ John R. Monroe
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CERTIFICATE OF SERVICE

I certify that on June 10, 2013, I served a copy of the foregoing using the ECF system upon:

Peter Canfield
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and via U.S. Mail upon

Brandy Edwards
Clerk/Manager for the City of Nelson
P.O. Box 100
Nelson, GA 30151

/s/ John R. Monroe
John R. Monroe