FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIACARRY.ORG, INC., and REGIS GOYKE,	)	
Plaintiffs,	)	
v.	)	**CIVIL ACTION FILE**
PINKIE TOOMER, in her official capacity as Judge of the Probate Court of Fulton county, Georgia, and all others similarly situated,	)	**NO. 1:08-CV-2141-CC**
Defendants.	)	

BRIEF IN SUPPORT OF DEFENDANT PINKIE TOOMER'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

COMES NOW Defendant, the Honorable Pinkie Toomer, Fulton County Probate Judge (hereinafter "Judge Toomer"), and moves this Honorable Court to dismiss Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

I. FACTS AS ALLEGED IN THE AMENDED COMPLAINT[1]

Plaintiff GaCarry.Org, Inc. (hereinafter "GCO") is a non-profit corporation organized under the laws of the State of Georgia. (Amended Compl. ¶ 4). Plaintiff Regis Goyke (hereinafter "Goyke") is a citizen and resident of the state of

[1] As Plaintiffs' Amended Complaint is substantially identical to Plaintiffs' original Complaint in this matter, the instant Brief is in large part duplicative of Defendant's original Brief in Support of her Motion to Dismiss. The contentions added by Plaintiff's Amended Complaint are primarily addressed in Section III.A.1 of this Brief.

Wisconsin, a citizen of the United States and a member of GCO. (Amended Compl. ¶¶ 5-6). Goyke is a frequent visitor to the State of Georgia and has engaged in activities involving firearms, including the recreational shooting of handguns, while in the State of Georgia. (Amended Compl. ¶¶ 23-25). Judge Toomer serves as the Fulton County, Georgia Probate Judge. (Amended Compl. ¶ 7). James Brock serves as the Clerk of the Probate Court of Fulton County. (Amended Compl. ¶ 48).

On June 19, 2008, John Monroe, counsel for GCO and Goyke, allegedly wrote to Judge Toomer's office asking if Goyke would be permitted to apply for a Georgia firearms license (hereinafter "GFL") pursuant to O.C.G.A. § 16-11-129. (Amended Compl. ¶¶ 12, 14, 34). Plaintiffs allege that Judge Toomer's clerk responded in writing expressing his opinion that Goyke would not be allowed to apply for a GFL as the law governing the issuance of GFL's does not make any exceptions allowing persons who are not residents of the State of Georgia to be granted a GFL. (Amended Compl. ¶¶ 1, 3, 35). There is no indication that Judge Toomer was in any way involved in the preparation of this response or that she was even aware that such an inquiry had been received by her clerk. (Amended Compl., generally).

Plaintiffs allege that blank GFL applications are not readily available to the general public and are "closely guarded." (Amended Compl. ¶ 46). However, there is no indication that Goyke or his counsel requested such an application at any time relevant to this matter. (Amended Compl., generally). Plaintiffs further allege that Judge Toomer had, in essence, delegated the authority to receive and process GFL applications. (Amended Compl. ¶ 40). Again however, there is no indication that Goyke ever requested a GFL application or ever actually applied for a GFL at any point or took any other steps to challenge or verify the opinion of this member of Judge Toomer's staff. (Amended Compl., generally)).

Plaintiffs further allege that Mr. Brock, as clerk of the Fulton County Probate Court, is in essence the gatekeeper of GFL applications, (Amended Compl. ¶ 43), and that Judge Toomer has effectively delegated her responsibility as to GFL applications to Mr. Brock. (Amended Compl. ¶ 40). However, there is no allegation that any Plaintiff in this case has ever been denied a GFL when such was requested and Plaintiffs' Amended Complaint points to no individual who has ever been denied a GFL application when such actually was requested. (Amended Compl., generally).

Plaintiffs allege Judge Toomer's clerk's opinion that Goyke would not be allowed to apply for a GFL permit amounts to a violation of their rights under the Privileges and Immunities Clause of the Constitution of the United States. (Amended Compl. ¶ 71). Plaintiffs further assert that this same statement of opinion amounts to a violation of the Militia Clause of the United States Constitution (Amended Compl. ¶ 72), the Second Amendment to the United States Constitution (Amended Compl. ¶ 73), and the Equal Protection provisions of the Fourteenth Amendment to the United States Constitution (Amended Compl. ¶¶ 74-75).

Finally, Plaintiffs assert that the current action is authorized as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and attempts to define a class of defendants to include every probate judge in the State of Georgia, (Amended Compl. ¶¶ 8-9), and that Judge Toomer is an adequate representative of the proposed class of defendants.[2] (Amended Compl. ¶ 10).

[2] This motion does not address Plaintiffs' class action allegations, as those will be addressed in response to Plaintiffs' Motion to Certify Class filed on July 10, 2008.

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure provides for dismissal of an action if the court lacks subject matter jurisdiction. When reviewing a motion to dismiss for lack of subject matter jurisdiction, the Court construes the allegations of the complaint in a light most favorable to the pleader. *Scheuer v. Rhodes,* 416 U.S. 232, 236-37, 94 S.Ct. 1683, 1686-87 (1974); *Cole v. United States,* 755 F.2d 873, 878 (11th Cir. 1985).

Motions to dismiss pursuant to Rule 12(b)(1) require the court to determine whether plaintiff has sufficiently alleged a basis of subject matter jurisdiction. *Lawrence v. Dunbar,* 919 F.2d 1512, 1529 (11th Cir. 1990). In such considerations, the court must take the allegations in the complaint as true for purposes of the motion. *Id.* Because standing and ripeness are jurisdictional issues, a motion to dismiss for lack of standing or ripeness may be brought properly under Rule 12(b)(1). *Region 8 Forest Serv. Timber Purchasers Council v. Alcock,* 993 F.2d 800, 807 (11th Cir. 1993).

Likewise, a complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted if it does not plead “enough facts to state a

claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* --- U.S. ---, 127 S.Ct. 1955, 1974, (2007) (rejecting the traditional 12(b)(6) standard set forth in *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02 (1957)). The allegations in Plaintiffs' complaint are presumed true at this stage, and all reasonable factual inferences must be construed in their favor. *Hunnings v. Texaco, Inc.,* 29 F.3d 1480, 1484 (11th Cir. 1994). However, "the court need not accept inferences drawn by plaintiff if such inferences are unsupported by the facts set out in the complaint. Nor must the court accept legal conclusions cast in the form of factual allegations." *Kowal v. MCI Commc'ns Corp.,* 16 F.3d 1271, 1276 (D.C. Cir. 1994); *accord Lewis v. Brautigam,* 227 F.2d 124, 127 (5th Cir. 1955). To survive a motion to dismiss, the factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Twombly,* 127 S.Ct. at 1965.

III. ARGUMENT AND CITATION TO AUTHORITY

A. This Court Lacks Subject Matter Jurisdiction Over the Amended Complaint

Plaintiffs have failed to allege facts sufficient to establish subject matter jurisdiction in this Court. Article III of the U.S. Constitution limits the power of the federal courts to hear "cases" and "controversies." U.S. Const. Art.

III, § 2. Therefore, in order to exercise subject matter jurisdiction over a case, the court must determine initially whether the plaintiff has standing to bring his claims and whether his claims are ripe. *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1223 (11th Cir. 2004).

There is considerable overlap between the doctrine of ripeness and standing, and in practice, these two justiciability doctrines present similar inquiries. *Women's Emergency Network v. Bush,* 323 F.3d 937, 945-56, n. 10 (11th Cir. 2003) (citing Erwin Chemerinsky, *FEDERAL JURISDICTION,* pp. 114-17 (3d ed. 1999)). What distinguishes the two is that the ripeness doctrine seeks to separate matters that are premature for review because the injury is speculative and may never occur, whereas standing focuses on whether the type of injury alleged is qualitatively sufficient to fulfill the requirements of Article III and whether the plaintiff personally suffered that harm. *Abusaid v. Hillsborough County Bd. Of County Com'rs*, 2007 WL2669210 (M.D. Fla. 2007) (citing Erwin Chemerinsky, *FEDERAL JURISDICTION,* 113-15 (3d ed. 1999)).

1. Plaintiffs Have Failed to Present A Ripe Controversy Because No Plaintiff Ever Applied for a George Firearms License

Article III of the United States Constitution limits the jurisdiction of the federal courts to cases and controversies of sufficient concreteness to evidence ripeness for review. *See* U.S. Const., Art. III, § 2, cl. 1; *see also, Digital Props. v. City of Plantation*, 121 F.3d 586, 589 (11th Circ. 1997). The ripeness doctrine protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes. *Id.*

The ripeness inquiry requires a determination of (l) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. *Id.* Courts must resolve "whether there is sufficient injury to meet Article III's requirement of a case or controversy and, if so, whether the claim is sufficiently mature, and the issues sufficiently defined and concrete, to permit effective decision making by the court." *Id*.

In considering fitness and hardship, courts must consider whether delayed review would cause hardship to plaintiff, whether judicial intervention would inappropriately interfere with further administration action, and whether courts would

benefit from further factual development of issues presented. *Ala. Power Co. v. Fed. Energy Regulatory Comm'n,* 685 F.2d 1311, 1315 (11th Cir. 1982). In such matters, a plaintiff has the burden to clearly allege facts demonstrating that it is a proper party to invoke judicial resolution of the dispute. *2025 Emery Highway v. Bibb County*, 377 F. Supp. 2d 1310 (M.D. Ga. 2005).

In the instant case, Plaintiffs' claims as asserted against Judge Toomer are not ripe because neither Plaintiff ever actually made an application for a GFL to Judge Toomer or to the judge of any other probate court in the State of Georgia. Indeed, neither Goyke nor his counsel ever even requested an application from any member of Judge Toomer's staff. Similarly, in *Digital*, the Court held that the plaintiff, who challenged the purported denial of a rezoning, did not present a ripe claim against the defendant city because plaintiff "did not pursue its claim with the requisite diligence to show that a mature case or controversy exists." *Digital*, 121 F.3d at 590.

In *Digital*, a city employee in the zoning department told the plaintiff that his intended use was impermissible at the intended location. *Id.* The employee then directed the plaintiff to speak with the director of his department; instead, the plaintiff sued. *Id*. In light of these facts, the Court found

that subject matter jurisdiction did not exist "[w]ithout presentation of a binding conclusive administrative decision." *Id*. The court concluded that "at a minimum, Digital had the obligation to obtain a conclusive response from someone with the knowledge and authority to speak for the City." *Id.* at 590.

In this case, Plaintiffs, just like the plaintiff in *Digital*, failed to pursue a final, concrete decision. Plaintiffs never filed or even sought to file an application for a GFL with Judge Toomer or any other probate judge in the State of Georgia. The Amended Complaint shows that Plaintiffs' counsel merely inquired of Judge Toomer's clerk whether a GFL application filed by Goyke would be accepted. While Plaintiffs allege that such applications are not generally available to the public, there is no indication that Goyke, his counsel or any other member of GCO ever requested such an application.

Additionally, the Amended Complaint shows that Plaintiffs never questioned this opinion or actually filed such a GFL application with Judge Toomer, an individual vested with the authority to determine if such an application complies with the law. Indeed, no action of any kind was ever taken by Judge Toomer, any other probate judge in the State of Georgia, or any person authorized under Georgia law to take action in relation

to this matter as no GFL application was ever filed that would have required such action.

Instead, Plaintiffs inexplicably accepted a statement from a member of Judge Toomer's staff as a final decision in this matter and filed the instant action. While Plaintiffs assert that Judge Toomer had a policy of not allowing non-residents of Georgia to apply for and receive GFL's, Plaintiffs have not alleged that they ever actually requested a GFL application from Judge Toomer or any member of her staff. Indeed, Plaintiffs have not named a single individual who was denied a GFL application when one was requested from a member of Judge Toomer's staff or from any other probate court within the State of Georgia. An inquiry as to whether an individual would be allowed to apply for a GFL under certain circumstances simply does not equate to an request for a GFL application and certainly does not equal the denial of a GFL. Therefore, by failing to present an application to anyone capable of approving or denying same and simply relying on the opinion of a member of Judge Toomer's staff, Plaintiffs, like the plaintiff in *Digital*, did not ripen the controversy.

It is worth noting that O.C.G.A. § 16-11-129 was amended, effective July 1, 2008, to add a new section (j), as follows:

> When an eligible applicant who is a United States citizen fails to receive a license, temporary permit, or renewal license within the time period required by this code section and the application or request has been properly filed, the applicant may bring an action in mandamus or other legal proceeding in order to obtain a license, temporary license, or renewal license, and such applicant shall be entitled to recover his or her costs in such action, including attorney's fees.

While the new O.C.G.A. § 16-11-129(j) did not become law until several days after Plaintiffs' counsel's initial conversation with members of Judge Toomer's staff, it is nonetheless instructive as it makes clear that only those applications which have been properly filed and denied can be the subject of subsequent court action.

In light of this recent change in the applicable law, it is equally clear that delayed review of this matter by this Court would not cause hardship to Plaintiffs as their rights in the event of a denial of a GFL application, had one ever been filed or even requested, are now more clearly defined than they were just a few weeks ago. Nothing prevents Goyke from either requesting or from actually filing a GFL application with the Fulton County Probate Court at this juncture. Indeed, should such a license application be denied once properly filed, O.C.G.A. § 16-11-129(j) clearly defines a procedure to appeal such a denial through the courts.

As Plaintiffs failed to request or to file an application for a GFL or to otherwise pursue a final, concrete decision on the issuance of a GFL from Judge Toomer or any other individual vested with the authority to issue a GFL, Plaintiffs have failed to present a ripe controversy to this Court. As such, this Court is without subject matter jurisdiction as to this matter and should dismiss Plaintiffs' Amended Complaint on these grounds.

2. Plaintiff Goyke Has No Standing to Prosecute the Present Action as He Has Suffered No Injury

The U.S. Constitution limits the subject matter jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. Art. III, § 2. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 2136 (1992). Standing "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 2205 (1975). "In the absence of standing, a court is not free to opine in an advisory capacity about the merits of a plaintiff's claims," *Bochese v. Town of Ponce Inlet,* 405 F.3d 964, 974 (11th Cir. 2005), and "the court

is powerless to continue," *Univ. of S. Ala. v. Am. Tobacco Co.,* 168 F.3d 405, 409 (11th Cir. 1999).

In order to establish the Article III requirements of standing, a plaintiff who invokes the jurisdiction of a federal court must demonstrate: (1) an injury-in-fact, one that is concrete and particularized, and actual or imminent, not conjectural or hypothetical; (2) there is a causal connection between the injury and the conduct complained of, that is, the injury is fairly traceable to the conduct of the defendant; and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37 (1992); *Granite State Outdoor Adver., Inc. v. City of Clearwater,* 351 F.3d 1112, 1116 (11th Cir. 2003).

"An 'injury in fact' requires the plaintiff to 'show that he personally has suffered some actual or threatened injury." *CAMP Legal Defense Fund v. City of Atlanta,* 451 F.3d 1257, 1269 (11th Cir. 2006) (quoting *Granite State Outdoor Adver., Inc. v. City of Clearwater, Fla.,* 351 F.3d at 1117). The only injury or even potential injury that Plaintiffs assert in this case is a generalized "fear of arrest and prosecution" on the part of Goyke as he "wishes" to engage in certain activities involving a

hand gun. (Amended Compl. ¶ 31). Likewise, GCO does not allege that it has itself been the subject of any injury or that any member of that organization other than Goyke has suffered such an injury.

Goyke does not allege that he has ever actually been prosecuted for any of the asserted handgun related activities. In order for a plaintiff to satisfy the injury in fact requirement in a pre-enforcement challenge to a statute such as that asserted here, there must be a realistic danger of the plaintiff's sustaining a direct injury as a result of the enforcement of the statute. *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298, 99 S.Ct. 2301, 2308-09 (1979). Abstract harm is insufficient; a plaintiff must establish an actual or threatened injury. *E.F. Hutton & Co. v. Hadley,* 901 F.2d 979, 984 (11th Cir. 1990); *Warth v. Seldin,* 422 U.S. at 508, 95 S.Ct. at 2210. A plaintiff may carry this burden by showing that either (1) he was threatened with prosecution, (2) prosecution is likely, or (3) there is a credible threat of prosecution. *ACLU v. The Fla. Bar,* 999 F.2d 1486, 1492 (11th Cir. 1993). Although a plaintiff need not expose himself to actual arrest or prosecution under the statute, the fear of prosecution must be more than imaginary or speculative.

Babbitt, 442 U.S. at 298, 99 S.Ct. at 2308-09. "[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Id.* (quoting *Younger v. Harris,* 401 U.S. 37, 42, 91 S.Ct. at 746, 749 (1971)).

Plaintiffs here have not established or even alleged that Goyke or any other member of GCO has been prosecuted, threatened with prosecution, or that prosecution of any such person is likely. Indeed, Plaintiffs assert that Goyke "wishes" to carry a handgun in certain manners (Amended Compl. ¶ 31), but does not in any way establish that he has an intent to do so or that such actions would result in prosecution or even a credible threat of prosecution.

Even if Goyke is seen to have suffered an injury or a potential injury in this matter, Plaintiffs have not established a causal connection between the injury and the conduct complained of because Judge Toomer took no action in this matter. While the issuance of a GFL might theoretically serve to alleviate Goyke's purported fears, it is important to note that Goyke never actually applied for a GFL or even requested a GFL application from any member of Judge Toomer's staff. The fear Goyke now suffers was not caused by any actions taken by

Judge Toomer or any other probate judge in the State of Georgia, but by Goyke's own failure to apply for a GFL. Indeed, Judge Toomer has taken no action in this matter. Judge Toomer cannot be responsible for fears that are based in large part on Goyke's own failure to follow the law.

As the only injury alleged by Goyke is hypothetical in nature and cannot be tied to any actions or inactions taken by Judge Toomer, any other probate judge in the State of Georgia, or any person authorized by Georgia law to issue a GFL, Goyke is without standing to maintain the instant action. As such, this Court is without jurisdiction to hear this matter and it should be dismissed in its entirety.

3. Plaintiff GCO Has No Standing to Prosecute the Present Action as None of Its Members Have Suffered Any Harm

GCO asserts that it has initiated the instant action on behalf of other out of state members of its organization who wish to apply for and be granted GFLs. However, GCO has not alleged any specific injury to itself or any of its other members as a result of the facts at the center of this matter.

An association such a GCO has standing to bring suit on behalf of its members only when (1) its members would otherwise have standing to sue in their own right; (2) the interests it

seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197 (1975). Goyke, a member of GCO, does not have standing to bring the instant action for the reasons outlined above. Further, Plaintiffs' Amended Complaint alleges that "GCO has other members who are nonresidents of Georgia and who would like to apply for and obtain a GFL" (Amended Compl. ¶ 62), establishing that no GCO member has actually applied for a GFL. As such, no other member of GCO can be seen to have standing to maintain the present action under the same analysis applied to Goyke above.

As GCO has failed to set forth any allegations of injury to the organization itself or that would establish standing for any of its members to maintain the instant action, GCO has no standing in this matter. As such, this Court is without jurisdiction to hear this matter and it should be dismissed in its entirety.

B. The Amended Complaint Fails to Set Forth Any Cognizable Constitutional Claims

Plaintiffs allege that Judge Toomer's clerk's opinion that Goyke would not be allowed to apply for a GFL permit amounts to a violation of their rights under the Privileges and Immunities

Clause of the U.S. Constitution (Amended Compl. ¶ 71), the Militia Clause of the U.S. Constitution (Amended Compl. ¶ 72), the Second Amendment to the U.S. Constitution (Amended Compl. ¶ 73), and the Equal Protection provisions of the Fourteenth Amendment to the U.S. Constitution. (Amended Compl. ¶¶ 74-75). As is more fully demonstrated below, Plaintiffs have failed to plead facts sufficient to support any of the asserted Constitutional claims against Judge Toomer.

1. The Amended Complaint Fails to Establish a Violation of Plaintiffs' Rights Under the Privileges and Immunities Clause of the U.S. Constitution

Goyke asserts that Judge Toomer's purported refusal to allow him to apply for and receive a GFL based on his status as a non-resident of the State of Georgia amounts to a violation of his rights as secured under the privilege and immunities clause of the United States Constitution. (Amended Compl. ¶ 71). When examining claims that a citizenship or residency classification offends privileges and immunities protection, a two-step inquiry is undertaken: (1) the activity in question must be sufficiently basic to the livelihood of the nation so as to fall within purview of privileges and immunities clause; and (2) if the challenged restriction deprives nonresidents of protected privilege, it will be invalidated only if the restriction is not

closely related to advancement of substantial state interest. *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 208 S.Ct. 2260 (1988).

In this matter, Plaintiffs have failed to allege any specific activities from which Goyke or GCO are now restricted as a result of Judge Toomer's alleged actions. The activities listed, including the ability to carry a concealed handgun, to carry a handgun while traveling through a school zone, or to carry a handgun for self defense (Amended Compl. ¶ 31), would be prohibited to Goyke under any conceivable circumstances as he failed to ever file the required GFL application with Judge Toomer, any other probate judge in the State of Georgia, or any person authorized under the laws of the State of Georgia to issue a GFL. Moreover, Plaintiffs have failed to allege that any of these activities are sufficiently basic to the livelihood of the nation so as to fall within purview of privileges and immunities clause. Absent such allegations, this Court cannot reach the question of the State's interest in restricting these same activities. As such, Goyke's assertions as to violations of the privileges and immunities clause of the United States Constitution by Judge Toomer must be dismissed.

As to GCO, the United States Supreme Court has held that corporations and other business entities are not "citizens" within the meaning of this clause. *Paul v. Virginia,* 75 U.S. (8 Wall) 168, 177 (1869) ("The term citizens [as used in Article IV privileges and immunities clause applies only to natural persons ... not to artificial persons created by the legislature."); *see also Asbury Hospital v. Cass County,* 326 U.S. 207, 210-11, 66 S.Ct. 61, 63-64 (1945) (corporation is not citizen); *W.C.M. Window Co., Inc. v. Bernardi,* 730 F.2d 486, 492-92 (7th Cir.1984) (unincorporated association is not citizen). Because GCO is a non-profit corporation, GCO is not a natural person and cannot maintain a suit for violations of the privileges and immunities clause.

2. The Amended Complaint Fails to Establish a Violation of Plaintiffs' Rights Under the Militia Clause of the U.S. Constitution

Plaintiffs assert that Judge Toomer abridged rights extended to them through the Militia Clause of the U.S. Constitution when she allegedly refused to allow Goyke to apply for and receive a GFL (Amended Compl. ¶ 72). The Militia Clause, Article I, § 8, authorizes Congress to provide for (1) calling forth the militia to execute federal law, suppress insurrections, and repel invasions, and (2) organizing, arming,

disciplining, and governing such part of the militia as may be employed in the federal service, reserving to the States the appointment of officers and the power to train the militia according to the discipline prescribed by Congress. *Perpich v. Department of Defense*, 496 U.S. 334, 110 S.Ct. 2418 (1990).

Plaintiffs have neither alleged nor directed this Court's attention to any factual basis supporting such a claim. Indeed, while the Amended Complaint asserts that Judge Toomer abridged rights extended to Plaintiffs through the Militia Clause of the Constitution of the United States (Amended Compl. ¶ 72), they have alleged no specific action by Judge Toomer that has had such an effect. In fact, neither Judge Toomer nor any other probate judge in the State of Georgia took any action at all in this matter as neither Plaintiff ever filed the required GFL application triggering such action. As such, Plaintiffs' assertions as to violations of the Militia Clause of the United States Constitution by Judge Toomer or any other probate judge in the State of Georgia must be dismissed.

3. The Amended Complaint Fails to Establish a Violation of Plaintiffs' Rights Under the Second Amendment to the U.S. Constitution

Plaintiffs assert that Judge Toomer abridged rights extended to them through the Second Amendment to the U.S.

Constitution when she allegedly refused to allow Goyke to apply for and receive a GFL. (Amended Compl. ¶ 73). As has been established herein, Judge Toomer took no action whatsoever in this matter and none was required of her or any other probate judge in the State of Georgia as neither Plaintiff ever filed or even requested the required GFL application. Only the filing of such an application would require action by the appropriate probate court judge.

In any event, Plaintiffs' reliance on the Second Amendment is misplaced. While the Eleventh Circuit has not directly addressed this question, the federal courts that have uniformly determined that the Second Amendment offers protection only against actions by the federal government, not the individual states.[3] As the Second Amendment to the U.S. Constitution has

[3] *See Thomas v. Members of the City Council of Portland,* 730 F.2d 41, 42 (1st Cir. 1984) (per curiam); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942) ("[T]he only function of the Second Amendment [is] to prevent the federal government and the federal government only from infringing that right."); *Love v. Pepersack*, 47 F.3d 120, 123 (4th Cir. 1995) ("The Second Amendment does not apply to the states."); *Edwards v. City of Goldsboro*, 178 F.3d 231, 232 (4th Cir. 1999) ("[T]he law is settled in our circuit that the Second Amendment does not apply to the States."); *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 539 n. 18 (6th Cir. 1998) ("The Supreme Court has held that the Due Process Clause of the Fourteenth Amendment does not incorporate the Second Amendment; hence, the restrictions of the Second Amendment operate only upon the Federal Government."); *Quilici v. Village of Morton Grove*, 695

been widely held to apply only to federal actions, Plaintiffs assertions as to violations of the Second Amendment by Judge Toomer or other probate judges in the State of Georgia must be dismissed.

4. The Amended Complaint Fails to Establish a Violation of Plaintiffs' Rights Under the Equal Protection Provisions of the Fourteenth Amendment to the U.S. Constitution

Plaintiffs assert that Judge Toomer abridged rights extended to them through the Fourteenth Amendment to the U.S. Constitution when she allegedly refused to allow Goyke to apply for and receive a GFL. (Amended Compl. ¶¶ 74-75). In order for a plaintiff to establish that a violation of his rights under the equal protection provision of the Fourteenth Amendment, he must first show that similarly situated persons have been treated differently by the state. *Zeigler v. Jackson,* 638 F.2d 776 (5th Cir. 1981).

Plaintiffs have neither alleged nor directed this Court's attention to any factual basis for their equal protection claims. Indeed, while the Amended Complaint asserts that Judge

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F.2d 261, 270 (7th Cir. 1982) ("[T]he second amendment does not apply to the states."); *Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 731 (9th Cir. 1992) ("[T]he Second Amendment limits only federal action, and we affirm the district court's decision 'that the Second Amendment stays the hand of the National Government only.'").

Toomer abridged rights extended to Plaintiffs through the Fourteenth Amendment (Amended Compl. ¶ 74-75), they have alleged no specific action by Judge Toomer that has had such an effect. Further, nowhere in Plaintiffs' Amended Complaint do they allege how they were treated differently from others similarly situated. As such, Plaintiffs assertions as to violations of the Fourteenth Amendment to the United States Constitution by Judge Toomer must be dismissed.

IV. CONCLUSION

For all of the foregoing reasons, Judge Toomer respectfully requests that Plaintiff's Amended Complaint be dismissed.

Respectfully submitted, this 12th day of August, 2008.

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CERTIFICATE OF FONT TYPE, SIZE AND SERVICE

THIS IS TO CERTIFY that on the 12th day of August, 2008, I presented this document in Courier New, 12 point type in accordance with L.R. 5.1(C) and that I have served a copy of the foregoing **Brief In Support of Defendant Pinkie Toomer's Motion to Dismiss Plaintiffs' Amended Complaint** in accordance with this court's CM/ECF automated system which shall forward automatic e-mail notification of such filing to the following attorney's of record:

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