IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIACARRY.ORG, INC. *et. al.*, Plaintiffs	)	
	)	CIVIL ACTION FILE NO.
v.	)	1:08-CV-2141-CC
PINKIE TOOMER, *et. al.*	)	
Defendants.	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S SECOND MOTION TO DISMISS

Introduction

Defendant moves to dismiss Plaintiffs' Amended Complaint, claiming Plaintiffs should have attempted to apply for a Georgia firearms license ("GFL") in spite of the fact that Georgia statutory law forbids it and even after Defendant's office informed Plaintiffs' counsel in writing that such an attempt would not be permitted. In other words, the application would have been utterly futile. Defendant is playing a game with this Court in which she does not state anywhere that she would accept an application from a nonresident or issue a license to a nonresident in defiance of the state law requiring residency. Rather, she seeks merely a delay for Plaintiff Goyke to apply, even after he was told he would not be permitted to do so as a resident of

Wisconsin, so that Defendant could then refuse to accept the application (however unlikely it is that she would be ***personally*** involved in refusing to accept it at the counter) or accept but never act on the application (or deny the application for Plaintiff Goyke's failure to meet the statutory residency requirement). As Plaintiffs will show below, the law does not require Plaintiffs to engage in such ridiculous procedural gymnastics, and Defendant's Motion should be denied.

Defendant also argues that the Amended Complaint fails to allege any Constitutional violations. Such violations ***are*** alleged, and must be assumed *arguendo* to be valid on the merits. Defendant's Motion on these grounds should also be denied.

Defendant's Motion is presented in two parts, a 12(b)(1) motion and a 12(b)(6) motion. Plaintiffs will address each part separately below in sections A and B.

Argument

A. Rule 12(b)(1) Motion -- This Court has Subject Matter Jurisdiction

"[A] federal court may dismiss a federal question claim for lack of subject-matter jurisdiction only if: (1) the alleged claim under the Constitution or the federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction; or (2) such a claim is wholly insubstantial and frivolous." *Lanfear v. Home Depot, Inc.*, 2008 U.S. App. LEXIS 16243, No. 07-14362, decided July 31, 2008 (11th Cir 2008). Defendant has made no showing that Plaintiffs' federal claims

are immaterial (nor can she, as they are the crux of the case). Nor has she shown them to be insubstantial and frivolous.

1. Plaintiffs' Claims are Ripe

Forcing Plaintiffs to ***attempt*** to complete an application for which they are statutorily ineligible and to file it with an officer without authority to accept the application and issue the license would serve no purpose. As noted by the D.C. Court of Appeals when the Federal Communications Commission raised a similar standing and ripeness challenge, "The record before us is clear: But for the ban [on issuing the license sought], [Plaintiff] would have applied for a license, and the Commission points to no individual characteristics-of [Plaintiff]-that would have led it categorically to deny his application in the absence of the ban. Moreover, we agree with [Plaintiff] that applying for a waiver would have been futile." *Grid Radio v. F.C.C.*, 278 F.3d 1314 (C.A.D.C. 2002). The law does not require a futile act. *See, e.g., Northeastern Fla. Chapter of Associated General Contractors of America v. City of Jacksonville, Florida*, 508 U.S. 656, 665 (1993) ("To establish standing, therefore, a party … need only demonstrate that it is able and ready…."), *Evans v. City of Chicago*, 513 F.3d 735, 750 (7th Cir 2008) ("the law does not require a futile act" if it is clear that the action would have been denied).

Plaintiffs in this case are banned from applying for a license and were told by Defendant's office that they could ***not*** apply. In addition, Defendant points to no characteristics that would have lead her to deny Plaintiffs' application in the absence of the statutory ban on nonresident applications. She likewise provides no indication that she would ***disobey*** state law and issue a license to Plaintiff Goyke.

2. **Defendant's Main Case Is Distinguished by Its Facts**

The cases cited by Defendant are inapposite to Plaintiffs' factual situation. Defendant relies primarily on *Digital Properties v. City of Plantation,* 121 F.3d 586 (11th Cir 1997), in which the plaintiff desired to open an adult bookstore in a zone that did not explicitly allow adult bookstores (although it did not specifically ***prohibit*** them, either). An "assistant zoning technician" advised the plaintiff that she did not believe the zoning ordinance would permit the proposed use, but told the plaintiff that decision was beyond her authority to determine and that the plaintiff should discuss the matter with the zoning director. Instead, the plaintiff filed suit. 121 F. 3d at 588-589. The court in *Digital Properties* held that the case was not ripe because 1) plaintiff merely assumed the ordinance did not permit the proposed use, when in fact the ordinance did not explicitly prohibit it; 2) plaintiff unreasonably relied on the statement of a ***non-supervisory employee*** who told plaintiff she ***had no authority*** to

answer their question; and 3) plaintiff ignored the advice to ask the zoning director (i.e., someone with authority) about the matter. 121 F.3d at 590-591.

The facts of *Digital Properties* are nothing like the facts at bar. Rather than an ordinance that does not explicitly address the situation, Plaintiffs are faced with a state statute that ***explicitly prohibits*** them from receiving GFLs as non-residents of Georgia. Instead of speaking with a non-supervisory employee, Plaintiffs' counsel contacted the Clerk of the Probate Court, an executive position with ***considerable authority*** and supervisory responsibilities to whom the GFL application process has largely been delegated by Defendant. Amended Complaint, ¶¶ 39-40. Plaintiffs were not advised to ask the probate judge about the matter, and Defendant does not even now argue that she would issue a license to a nonresident or that she has any authority to do so under Georgia law even if she desired to do so. In short, this case is about as far away from the facts in *Digital Properties* as a case can get.

3. **The Statute and Defendant's Policy Forbid Nonresident Licenses**

O.C.G.A. § 16-11-129(a) requires that an applicant for a GFL reside in the county in which he applies. Defendant's own web site states in its firearms license section, "You must live in Fulton County." Plaintiffs had every reason to rely on the explicit language of the statute and Defendant's web site, but went the extra mile of

actually asking (in writing) the Clerk of the Probate Court, to whom Defendant has delegated the GFL process, whether Plaintiff Goyke would be permitted to apply for a GFL. The answer was an unequivocal "No, he has to be a domiciliary of Georgia…." Amended Complaint, ¶ 35.

Defendant disingenuously attempts to downplay the position of the Clerk of the Probate Court by calling him "Judge Toomer's clerk" and merely "a member of Judge Toomer's staff." Doc. 12-2, p. 11. To be clear, Plaintiff's counsel contacted ***the*** Clerk of the Fulton County Probate Court, James Brock, not a deputy, assistant, or front counter employee. Amended Complaint, ¶¶ 35, 48. The Clerk of the Fulton County Probate Court manages and supervises a large staff of deputies and assistants. *Id.*, ¶ 39. Mr. Brock is a member in good standing of the State Bar of Georgia and is even admitted to practice before this Court. *Id.*, ¶ 48. The reason Plaintiffs' counsel contacted Mr. Brock in the first place was because Plaintiffs' counsel had had many dealings with Mr. Brock in the past, and Mr. Brock appeared to exercise ***a great deal of authority*** over the issuance of firearms licenses. *Id.*, ¶ 49.

Defendant also misleads this Court by emphasizing repeatedly that Plaintiffs never filed an application for a GFL ***with her.*** By making this complaint, Defendant implies that it is possible to file an application for a GFL ***with her.*** It is not. *Id.*, ¶ 41.

Plaintiffs could readily produce declarations from tens or even hundreds of Fulton County GFL holders that have never met Defendant and that received their GFLs from the Fulton County Probate Court without filing an application ***literally*** with Defendant. Defendant is the sole judge in the largest probate court in the State of Georgia. She is responsible for estates, guardianships, and conservatorships, in addition to marriage licenses and GFLs. Because she must exercise judicial discretion in most probate matters, she understandably delegates her authority in ministerial matters such as issuing marriage licenses and firearms licenses.[1] *Id.*, ¶ 40. It is disingenuous, however, for her to delegate such authority and then complain to this Court that Plaintiffs did not consult ***with her*** before commencing this action.

Moreover, Defendant ignores the fact that she was apprised of the situation before this action was commenced. When Mr. Brock informed Plaintiffs' counsel that Plaintiffs would not be permitted to apply for a GFL, Plaintiffs' counsel told Mr. Brock, again in writing, that Plaintiffs would challenge that position on constitutional grounds. *Id.*, ¶ 36. Plaintiffs' counsel also asked Mr. Brock to alert Defendant of that fact so she would not be surprised when the summons and complaint were served. *Id.*

[1] She processed 3,872 firearms license applications and 5,079 marriage license applications in 2005, according to reports she supplied to the Georgia Administrative Office of the Courts.

When Plaintiffs' counsel served Defendant with the summons and complaint, Plaintiff's counsel told Defendant he had the summons and complaint "for the non-resident GFL issue" and said, "I discussed it with James [Brock] and asked him to tell you about it." In response, Defendant nodded and expressed no surprise at all. *Id.*, ¶ 50. At no point did she state to Plaintiffs that she would issue a firearms license to a nonresident, and she does not do so now.

Mr. Brock and Defendant are both trained and licensed attorneys. *Id.*, ¶¶ 47-48. They both had every opportunity to advise Plaintiffs that non-residents would be permitted to apply for GFLs after Plaintiffs' counsel informed them that this action was imminent. They did not do so for one simple reason: Plaintiffs were not permitted to apply and would not be permitted to apply. The state law does not allow Plaintiffs, as nonresidents, to obtain GFLs, and Defendant is attempting to obey the state law. Unless and until this Court tells her she must accept and process nonresident applications, she will not do so.

Defendant boldly asserts, "Nothing prevents Goyke from actually filing a GFL application with the Fulton County Probate Court at this juncture." Defendant would have this Court believe "filing" a GFL application is like filing a document at this Court's public counter on the 22nd Floor of the Federal Courthouse. It is not.

Plaintiff cannot even get a blank GFL application form without cooperation from Defendant or her staff. Blank GFL application forms are kept as closely-guarded documents. *Id.*, ¶ 46. They are not available on the internet or for the asking at the probate court. *Id.* If the counter clerks will not allow an applicant to apply, the applicant cannot apply. Without cooperation from the counter clerks, it is not possible to "file" an application. *Id.*, ¶ 44.

4. Defendant's Suggestion of Alternate Available Relief Does not Apply to Plaintiff

Defendant points out an irrelevant change to O.C.G.A. § 16-11-129, a new subsection (j), which allows an ***eligible*** GFL applicant to sue in mandamus when a "properly filed" GFL application does not result in issuance of a GFL within required time periods. Defendant, however, can and does control when an application is "properly filed." Her stated policy (on her web site and through the Clerk of the Probate Court) is not to accept applications from non-residents of Fulton County, Georgia. Plaintiffs could not survive a motion to dismiss in such a state law mandamus action (because they cannot "properly file" a GFL application), and Defendant knows that. It is disingenuous for her to suggest otherwise.

In addition, the mandamus action applies only to "eligible" applicants. Arguably, under state law (without regard to the Constitution of the United States)

Goyke is not "eligible" because of his nonresidency. Unless and until a court declares the residency requirement unconstitutional, a mandamus action would be a waste of time.

Finally, a plaintiff in a § 1983 action is not required to exhaust administrative remedies. *Patsy v. Board of Regents*, 457 U.S. 496, 516 (1982). Whatever appeal rights Defendant asserts that Plaintiffs ***could have employed*** if Defendant ***had not refused*** to let Plaintiff Goyke apply for a GFL, but instead ***had denied the application*** are speculative and irrelevant in this section 1983 lawsuit.

5. **Plaintiff Goyke Has Standing**

In order to establish standing, a plaintiff must show 1) actual or imminent injury; 2) caused by Defendant; and 3) redressable by the Court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The Court must assume *arguendo* that Plaintiffs would be successful on the merits when considering Plaintiffs' standing. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Defendant incorrectly asserts that Plaintiff Goyke does not have standing because he suffered no injury and, if he did, Defendant did not cause it.[2] Specifically, Defendant argues, "The only injury or even potential injury that Plaintiffs assert in this case is a generalized 'fear of arrest and prosecution'…." Doc. 12-2, p. 14. This lawsuit is not, however, a pre-enforcement challenge to a

criminal law. Defendant inexplicably ignores the Counts actually listed in the Amended Complaint [Doc. 10]. None of the Counts in the Amended Complaint mention a threat of arrest and prosecution.

The viability of Plaintiffs' Counts will be discussed below, in response to Defendant's Rule 12(b)(6) Motion, but for the purposes of the Rule 12(b)(1) Motion it is sufficient to point out that Plaintiffs allege that they were denied the opportunity to apply for and receive a GFL, in violation of several constitutional rights. The denial of a license that implicates constitutional rights is itself a sufficient injury for the purposes of standing. *See Dist. Intown Props. Ltd. Partnership v. District of Columbia,* 198 F.3d 874 (D.C.Cir 1999); *ATM Express, Inc. v. City of Montgomery,* 376 F.Supp.2d 1310, 1321 (M.D. Ala. 2005).

Moreover, without a GFL, Goyke ***is*** subject to arrest and prosecution for activities that otherwise would not be prohibited to him, some of which are felonies under Georgia and federal law (*See, e.g.*, O.C.G.A. § 16-11-126; O.C.G.A. 16-11-127; O.C.G.A. 16-11-127.1; O.C.G.A. § 16-11-128; and18 U.S.C. § 922(q). Thus, Goyke is deprived of a right to engage in activities in which he would be entitled to engage if Defendant would accept and process Goyke's GFL application and issue Goyke a

[2] Defendant apparently concedes the third prong of standing – redressability.

GFL. Defendant's refusal to do so effectively deprives Goyke of his 2nd Amendment and 14th Amendment rights to self defense, as discussed below in Part B.

It also is clear that Defendant caused the injury alleged (the denial of the right to apply for and receive a GFL). Defendant's policy (based on state law) is not to allow non-residents of Fulton County to apply for and receive a GFL. She has delegated the authority to receive and process GFL applications and to make GFL issuance decisions to the Clerk of the Probate Court. Amended Complaint, ¶ 40. The Clerk of the Probate Court told Plaintiffs' counsel that Plaintiffs could not apply for GFLs as non-residents. *Id.*, ¶ 35. Defendant cannot delegate her authority and then claim no responsibility for how that delegated authority is used, especially when the authority is used in conformance with her own policy.

6. Plaintiff GeorgiaCarry.Org has Standing

An organization such as GeorgiaCarry.Org, Inc. ("GCO") has standing to sue when its members would otherwise have standing, the interests it seeks to protect are germane to the organization's purpose, and the case does not require participation of the members. *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977); *Georgia Hospital Association v. Department of Medical Assistance*, 528 F. Supp. 1348, 1352 (N.D. Ga. 1982). Defendant, apparently conceding that the

second and third prongs of the test are met, claims only (and incorrectly) that GCO's members do not otherwise have standing. Nevertheless, in the interests of completeness Plaintiffs will address briefly all three prongs.

a. Plaintiffs' Members Have Standing

Plaintiffs already demonstrated in Part A2 above that Goyke has standing. Plaintiffs also alleged in their Amended Complaint that Plaintiffs have other members in the same situation as Goyke – they are nonresidents that want to apply for GFLs. Defendant's refusal to accept a GFL application from nonresidents was not specific to Goyke. It was categorical that no non-residents could apply (except for certain military personnel, which is not at issue in this case), and such refusal was based on Defendant's adherence to the state statute authorizing her to accept applications only from residents. All Plaintiffs' non-resident members, therefore, also have standing. Given that both Goyke and all Plaintiffs' other non-resident members have standing, the first prong of the test is met.

b. Plaintiffs' Claims are Germane to GCO's purpose.

GCO's purpose is to foster the rights of its members to keep and bear arms. Amended Complaint, ¶ 4. This case is about securing Goyke's and GCO's other members' rights to keep and bear firearms, rights which Georgia has chosen to

regulate by requiring a license. It is beyond dispute that this case is germane to GCO's purpose.

c. GCO's Other Members' Participation is Not Necessary

GCO has more than 2,000 members. *Id.* Defendant could not reasonably argue that it is necessary for all 2,000 to participate in this case (and indeed she has not made this argument). As noted above, Goyke's position is not unique among GCO's other non-resident members, so there is no reason to believe that more members' participation will be required. The members are not making individually unique claims and they are not seeking individually unique remedies. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 516 (1975). Plaintiffs are seeking prospective relief that will inure to the benefit of all nonresident members alike. There is no claim for individual damages requiring the participation of individual members.

Rule 12(b)(6) Motion -- Plaintiffs' Amended Complaint Does State a Claim For Which Relief Can be Granted

1. **Defendant Violated Plaintiffs' Rights Under the Privileges and Immunities Clause of the U.S. Constitution**

In a Privileges and Immunities Clause case, the Court must first determine if the activity in question is "sufficiently basic to the livelihood of the Nation. If it is, the challenged scheme will be invalidated only if it is not closely related to the advancement of a substantial state interest." *Supreme Court of Virginia v. Friedman*,

487 U.S. 59, 64-65 (1988). Defendant asserts, incorrectly, that Plaintiffs have not alleged that carrying a weapon for self defense is "sufficiently basic to the livelihood of the nation so as to fall within the purview of [the] privileges and immunities clause." Plaintiffs asserted just that in ¶ 32 of their Amended Complaint.[3]

The right to self defense existed at common law before and at the time of ratification of the Constitution. *District of Columbia v. Heller,* 554 U.S. ____, No. 07-290, Decided June 26, 2008, (Slip Opinion, pp. 26, 30). Citizens continue to have an inherent right to self defense. *Id.* at 56. Handguns are the quintessential self defense weapon. *Id.* at 57. A complete prohibition on their use is invalid. *Id.* at 58. A citizen must be permitted to carry a handgun in "the home." *Id.* at 64. [4]

Plaintiffs, however, are prohibited from carrying a handgun at all in Georgia. Under O.C.G.A. § 16-11-126, Plaintiffs are prohibited from carrying a concealed weapon (including a handgun) without a GFL. Under O.C.G.A. § 16-11-128, Plaintiffs are prohibited from carrying a pistol, without a GFL, outside of "his or her"

[3] Defendant apparently concedes that there is no substantial state interest in depriving Plaintiffs of the right to self-defense, as she does not raise any challenge to the second prong.

[4] Dick Heller, the plaintiff in the *Heller* case, did not raise the issue of carrying a handgun outside the home, and, therefore, the Supreme Court did not address the issue in its holding. Because he cannot obtain a firearms license, Plaintiff Goyke is prevented from bearing arms anywhere in Georgia, even in homes where he is visiting

home, motor vehicle, or place of business. Plaintiff Goyke does not have a home or place of business in Georgia. Amended Complaint, ¶ 27. He usually does not have his own motor vehicle when he visits Georgia. Amended Complaint, ¶ 26. Carrying a pistol without a GFL in another's motor vehicle is not permitted by Georgia law. *See Hubbard v. State,* 210 Ga. App. 141, 143 435 S.E.2d 709, 711 (1993) ("the fact that he was carrying the pistol in a motor vehicle which was not his own did not negate the need for a license"). The *Hubbard* court emphasized that a license is needed for someone to carry a firearm "outside *his* home, motor vehicle, or place of business," *id.* [emphasis in original]. This implies that carrying in another's home also would be a violation.

Thus, Plaintiff Goyke is not permitted to carry a pistol without a GFL, openly or concealed, ***anywhere*** in Georgia, even in the private ***home*** of his Georgia relatives. By denying him the right to apply for and receive a GFL through the disparate treatment of residents and nonresidents, Defendant has ***completely*** barred Plaintiff Goyke from carrying the quintessential self defense weapon ***anywhere in this state***. Such a blanket prohibition on the exercise of a fundamental right is impermissible,

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and temporarily living.

particularly when the state is denying the right to nonresidents but permitting it to residents.

While many Privileges and Immunities Clause cases involve commercial activities (*see, e.g.*, *Baldwin v. Montana Fish & Game Commission*, 436 U.S. 371 (1978); *Toomer v. Witsell*, 334 U.S. 385 (1948)), the Clause is by no means limited only to commercial activities. In *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 282 (footnote 11) (1985), the Court found that the practice of law is important to the "maintenance or well-being of the Union" not just as a profession but because lawyers represent people who raise unpopular federal claims. *Piper*, 470 U.S. at 281.

Likewise, the Supreme Court extended the Privileges and Immunities Clause to a noncommercial context when it held in *Doe v. Bolton*, 410 U.S. 179, 200 (1973) that Georgia's law limiting the availability of abortions to Georgia residents only (and thus discriminating against nonresidents) violated the Privileges and Immunities clause. In *Bolton*, the Court focused on the availability of medical care as the privilege at issue (not in any way discussing the commercial aspects of the practice of medicine). *Id.* If the availability of abortions, an unenumerated right not mentioned in the Constitution,

is "basic to the livelihood of the nation," then it is inconceivable that a specifically enumerated, fundamental right, such as the right to keep and bear arms, is not.[5]

Other circuits have also examined the Privileges and Immunities Clause and extended it to noncommercial contexts. The Third Circuit stated "it is equally clear that a state may not deprive noncitizens of the ability to engage in an essential activity or exercise a basic right." Lee v. Minner, 458 F.3d 194 (3rd Cir. 2006) (punctuation omitted). There is no right more basic than what *Heller* terms the "natural right of self defense." *See also Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148, 28 S.Ct. 34, 52 L.Ed. 143 (1907) (basic right of nonresidents to access courts protected by the Privileges and Immunities Clause); *Chappell v. Rich*, 340 F.3d 1279, 1282-83 (11th Cir. 2003) (basic right of access to courts secured by, *inter alia*, Article IV's Privileges and Immunities Clause).

Finally, the right to travel freely from one state to another "occupies a position fundamental to the concept of our Federal Union." *United States v. Guest*, 383 U.S. 745, 757 (1966) (right to freely travel to and from the State of Georgia). *See also Saenz v. Roe*, 526 U.S. 489, 119 S.Ct. 1518 (1999) (newly arrived citizens' access to welfare benefits in new state protected by right to travel and the privileges and

[5] "By the time of the founding, the right to have arms had become fundamental for

immunities enjoyed by other citizens); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 113 S.Ct. 753 (1993) ("A woman's right to engage in interstate travel for this purpose (*i.e*, abortion) is . . . entitled to special respect because she is exercising a constitutional right . . . Federal courts are uniquely situated to protect that right for the same reason they are well suited to protect the privileges and immunities of those who enter other States to ply their trade"). Goyke's fundamental right to travel to and from the State of Georgia, enjoying the same ability to defend himself and his family as Georgians have (a fundamental constitutional right) is frustrated by Defendant's refusal to allow Goyke to apply for and receive a GFL.

2. GCO's Citizenship is not an Issue

Despite the fact that Defendant admits that GCO may sue on its members' behalf, Defendant argues that GCO is not a "citizen" within the meaning of the Privileges and Immunities Clause and therefore cannot make a claim under that clause. This is an illogical conclusion based upon a flawed premise. GCO does not assert that ***it*** is a citizen. It asserts that its ***members*** are citizens. GCO's member citizens may sue under the Privileges and Immunities Clause, so GCO has organizational standing on behalf of its members. *See* Part A3 above.

English subjects." *Heller,* Slip Opinion at 20.

3. The Second Amendment Applies to Georgia, and Plaintiffs' Second Amendment Rights Have Been Violated

Defendant seeks to have Plaintiffs' Second Amendment claims dismissed on the ground that the Second Amendment does not apply to the states, without "engag[ing] in the sort of Fourteenth Amendment inquiry required by our later cases." *Heller*, 128 S.Ct. at 2813 n. 23. In support of their argument, Defendant cites a list of pre-*Heller* cases from the First, Fourth, Sixth, Seventh and Ninth Circuits,[6] all of which cite or rely on *Presser* or *Cruikshank*, two cases that predate the 20th Century application of the incorporation doctrine to the bulk of the Bill of Rights. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968) (applying right to trial by jury to states in criminal cases); *Benton v. Maryland*, 395 U.S. 784 (1969) (applying the Fifth Amendment's Double Jeopardy Clause to the states and overruling *Palko v. Connecticut*, 302 U.S. 319 (1937)).

[6] Somewhat surprisingly, Defendant fails to cite *Presser v. Illinois*, 116 U.S. 252 (1886) and *U.S. v. Cruikshank*, 92 U.S. 542 (1875). Plaintiff believes neither is good law today (for that proposition) but brings them to the Court's attention out of a sense of obligation of candor. The *Presser* court held only that there was not a Second Amendment right for a private citizen militia to parade in the City of Chicago. The *Cruikshank* court held that there was no Second Amendment right to be free from non-state actor disarmament. *Cruikshank* held similarly for the First Amendment. *Cruikshank* refused to consider the Fourteenth Amendment because the Court found no state action. *See Heller*, footnote 23.

In *Duncan,* the Court held that right to a trial by jury in criminal cases was "fundamental to the American scheme of justice." 391 U.S. at 149. In *Benton,* the Court held the prohibition against double jeopardy "represents a fundamental ideal in our constitutional heritage." 395 U.S. at 794. The *Benton* Court went on to say that "Once it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, the same constitutional standards apply against both the State and Federal Governments." 395 U.S. at 795 (citations omitted). "By the time of the founding, the right to have arms had become fundamental for English subjects." *Heller,* Slip Opinion at 20. Because the rights guaranteed by the Second Amendment are fundamental rights, they must be applied to the states as well.

Even though Defendant's cited cases are only persuasive and not controlling authority, it is worth noting that all of them rely on the "now thoroughly discredited" Cruikshank and *Presser*.[7] In 2002, the Ninth Circuit said:

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7 First Circuit: *Thomas v. Members of City Council*, 730 F.2d 41 (1st Cir 1984), is a one-paragraph *per curiam* opinion holding that the Constitution does not "grant" a right to carry a concealed handgun and it "confers" rights against the federal government only. Setting aside the fact that the Constitution ***guarantees*** pre-existing rights rather than "granting" or "confering" them, the First Circuit relied on *Presser* and a 7th Circuit case (*Quilici* - discussed below) for the proposition that the Second Amendment does not apply to the states. *Quilici* itself relied on *Presser*. *Cases v. United States*, 131 F.2d 916, 921 (1942), arose out of Puerto Rico. No ***state*** law was

> Following the now-rejected *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833) (holding that the Bill of Rights did not apply to the states), *Cruikshank* and *Presser* found that the Second Amendment restricted the activities of the federal government, but not those of the states. One point about which we are in agreement with the Fifth Circuit is that **Cruikshank *and* Presser *rest on a principle that is now thoroughly discredited.***

Silveira v. Lockyer, 312 F.3d 1052, 1067 (9th Cir 2002) (emphasis supplied). In *Silveira*, the Ninth Circuit rejected Second Amendment challenges on the premise that the Second Amendment did not guarantee an individual right (a position expressly

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implicated, as the law in question was an act of Congress. Anything *Cases* might say about application of the Second Amendment to the states was pure *obiter dictum*.

Fourth Circuit: *Love v. Pepersack*, 47 F.3d 120 (4th Cir 1995) held that the Second Amendment does not guarantee an individual right (overruled by *Heller*) and, relying on *Presser* and *Cruikshank*, that the Second Amendment does not apply to the states. *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir 1999), relying on *Pepersack*, reaffirmed that the Second Amendment does not apply to the states.

Sixth Circuit: *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 539 n. 18 (6th Cir 1998), relying on *Cruikshank* and *Presser*, held that the Second Amendment applies only to the federal government (this opinion also holds, now overruled by *Heller*, that the Second Amendment does not guarantee an individual right).

Seventh Circuit: *Quilici v. Morton Grove*, 695 F.2d 261 (7th Cir 1982), relying on *Presser*, determined that the Second Amendment does not apply to the States. *Quilici* also rejected the notion, now adopted by *Heller*, that the Second Amendment guarantees an individual right. As an interesting historical note, the Village of Morton Grove Board of Trustees recently repealed the handgun ban at issue in that case, as a result of the holding in *Heller*.

Ninth Circuit: *Fresno Rifle & Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 731 (1992), also relying on *Cruikshank* and *Presser*, determined that the Second Amendment does not apply to the states.

rejected by *Heller*) not premised on a lack of incorporation The reference in *Silveira* to the Fifth Circuit is *United States v. Emerson*, 270 F.3d 203, 221 n. 13 (5th Cir 2001), wherein the Fifth Circuit observed that *Cruikshank* and *Presser* pre-dated the Supreme Court's incorporation doctrine, and therefore were questionable under modern incorporation jurisprudence. *Heller* itself states that *Cruikshank* (and implicitly *Presser*), did not "engage in the sort of Fourteenth Amendment inquiry required by our later cases." 128 S.Ct. at 2813 n. 23.

Even the State of Georgia admits that the Second Amendment guarantees a fundamental right and is therefore incorporated by the Fourteenth Amendment and binding on the State. In its brief *amicus curiae* in the *Heller* case, Georgia and thirty other states said, "[*A*]*mici* states submit that the right to keep and bear arms ***is fundamental and so is properly subject to incorporation***…. In the judgment of *amici* States, the right to keep and bear arms is so rooted in the traditions and conscience of our people as to be ranked fundamental." *Brief of the States of Texas, Alabama, Alaska, Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Oklahoma, Pennsylvania, South Carolina, South Dakota, Utah, Virginia, Washington,*

West Virginia, and Wyoming as Amici Curiae *In Support of Respondent*, p. 23, Footnote 6, filed in *Heller* (emphasis added).

As a final note with respect to the Second Amendment position of Plaintiffs, it is important to note that in this particular case Plaintiffs are not challenging any Georgia law, other than the residency requirement, as a violation of the Second Amendment. Plaintiffs are not challenging the requirement to obtain a license (or even the other licensing eligibility factors, such as successfully passing a criminal background check more stringent than that applied to Georgia's law enforcement officers), or the laws regulating locations where a person with a Georgia license may bear arms, or the laws regulating the manner of bearing arms in Georgia. Plaintiffs in this lawsuit challenge only the categorical ban on nonresident licenses, and the legal consequence of barring Plaintiffs from an entire class of self defense weapons, handguns, which Plaintiffs as nonresidents may not bear in Georgia at all absent a license that they cannot legally obtain under Georgia law.

4. Plaintiffs Have a Valid Due Process Claim

Defendant mistakenly argues (again) that Plaintiffs have no valid ***equal protection*** claim under the Fourteenth Amendment, but Plaintiffs have not asserted such a claim. Count 4 of the Amended Complaint states a violation of the Privileges

and Immunities Clause and the ***Due Process*** clause of the Fourteenth Amendment. There is no mention of an equal protection claim.

Defendant does not attack Plaintiffs' Due Process claim, so it is not actually a subject of Defendant's Second Motion to Dismiss. If the Court determines that Count 3 (the Second Amendment claim) fails to state a claim, then there no longer is a specific constitutional provision that applies to Plaintiffs' claim of being deprived of the right of self defense. In that event, the Due Process Clause would apply and Plaintiffs would have a valid claim for being deprived for their common law right to self defense that existed at the founding of the nation.

Conclusion

Plaintiffs have shown that this Court has subject matter jurisdiction, the case is ripe, and Plaintiffs have standing. Plaintiffs further have shown that their Complaint states a claim for which relief may be granted. For these reasons, Defendant's Second Motion to Dismiss must be denied.

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Local Rule 7.1D Certification

The undersigned counsel certifies that the foregoing Plaintiffs' Response to Second Motion to Dismiss was prepared using Times New Roman 14 point, a font and point selection approved in LR 5.1B.

/s/ John R. Monroe
John R. Monroe

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Response in Opposition to Defendant's Second Motion to Dismiss on August 23, 2008 using the CM/ECF system which automatically will send email notification of such filing on the following:

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