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

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| **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.** | ) | |

**DEFENDANT PINKIE TOOMER'S REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S SECOND MOTION TO DISMISS**

COMES NOW Defendant, the Honorable Pinkie Toomer, Fulton County Probate Judge (hereinafter "Judge Toomer"), and files this Reply to Plaintiffs' Response in Opposition to Defendant's Second Motion to Dismiss, showing the Honorable Court as follows:

## I. THE COURT LACKS SUBJECT MATTER JURISDICTION

### A. Plaintiffs Have Failed to Present A Ripe Controversy Because No Plaintiff Ever Applied for a Georgia 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 Cir. 1997). In the instant case, Plaintiffs' claims as asserted against Judge Toomer are not ripe because neither Plaintiff has made an application for a Georgia Firearms license (hereinafter "GFL") to Judge Toomer or to the judge of any other probate court in the State of Georgia. Plaintiffs rely on *Grid Radio v. F.C.C.*, 278 F.3d 1314 (D.C. Cir. 2002) and *Evans v. City of Chicago*, 513 F.3d 735 (7th Cir. 2008) for the proposition that Goyke was not required to actually apply for a GFL as such an act would have been futile and the law does not require a futile act.

First and foremost, actually filing an application in this instance would not have been a futile act as such a filing would have given Judge Toomer the opportunity to actually review an application submitted by Plaintiff Goyke or any other member of Plaintiff GeorgiaCarry.Org, Inc. (hereinafter "GCO") to determine if such applicants would be eligible for the requested GFL. We cannot know with certainty what actions would have been taken as no such application was ever filed.

Second, Plaintiffs' reliance on *Grid Radio, supra*, and *Evans, supra,* is misplaced as neither is controlling precedent in this circuit. *Grid Radio,* a case decided by the D.C. Circuit Court of Appeals that has never been adopted or cited in the

Eleventh Circuit as applicable law, deals with Plaintiffs who were operating a radio station without the proper licensing and without seeking a waiver as to a ban of broadcasts in a certain format. Although *Evans* is not controlling precedent in this circuit, it only waives the threshold requirement that a plaintiff submit to a policy in order to establish standing to challenge same and to ripen his claim in those limited circumstances in which the plaintiff makes a substantial showing that application for the benefit would be futile. *Grid Radio* at 1319, *citing Prayze FM v. FCC*, 214 F.3d 245, 251 (2nd Cir. 2000); *Ellison v. Conner*, 153 F.3d 247, 255 (5th Cir. 1998); and *DKT Mem'l Fund, Ltd. V. Agency for Int'l Dev.*, 810 F.2d 1236, 1238 (D.C. Cir. 1987). Plaintiffs have failed to make such a substantial showing in this matter, simply alleging that such applications are closely controlled documents despite the clear indication on the Fulton County Probate Court website that these applications are indeed available at three different locations in Fulton County alone.

Likewise, *Evans* is a case decided by the Seventh Circuit Court of Appeals that has never been adopted by or cited in the Eleventh Circuit as applicable law. Indeed, the quote Plaintiffs present from *Evans* is buried deep in the dissent and

deals with the filing of a motion for continuance in a criminal trial, a matter that could not be more far removed from the issues at bar.

Plaintiffs have failed to show how either *Grid Radio* or *Evans* is controlling in this circuit or to cite a single case from this Circuit that addresses the proposition asserted by Plaintiffs. Even if the holding of *Grid Radio* were applied in this matter, Plaintiffs have failed to make a substantial showing that application for the benefit would have been futile in this matter or to otherwise establish that Plaintiffs have presented a ripe claim to this Court.

**B. The Facts of *Digital Properties v. City of Plantation* Are Analogous to the Matter at Bar**

Plaintiffs' attempts to distinguish the case at bar from *Digital Properties v. City of Plantation*, 121 F.3d 586 (11th Cir. 1997) simply illustrate the underlying similarities in the two matters. Nothing in Georgia law prevents Plaintiff Goyke from applying for a GFL. Plaintiffs unreasonably relied on the statement of Judge Toomer's clerk that an application would not be accepted despite the provisions of O.C.G.A. § 16-11-129 that vest the authority to issue a GFL in the judge of the probate court, not her clerk, and clear indications of the Fulton County

Probate Court Website that GFL applications are available at three different locations within Fulton County.

While Plaintiffs may have failed to speak directly to Judge Toomer regarding the proposed application, filing such an application would, in essence, be an appeal to the individual with the ultimate authority to grant a GFL to reconsider the Clerk's statement that such a license would not be issued to Goyke. This same statute should have been enough to direct Plaintiffs to file an application with any probate court judge, the only persons authorized to issue a GFL under Georgia law or to give "a conclusive response from someone with the knowledge and authority to speak for the [County]," as required by the holding in *Digital*. *Digital Properties* at 590 (11th Cir. 1997). Without such a conclusive response from someone authorized to give such a response, there is no ripe case or controversy presented for the Court's review in this matter.

**C. The Statute Authorizes the Probate Judge to Issue GFLs**

Plaintiffs repeatedly assert that Defendant Toomer has delegated the responsibility for issuance of GFLs to her clerk. However, the plain language of O.C.G.A. § 16-11-129(a) vests the power to issue GFLs in the probate court judges of each county and does not contemplate that such licenses will be issued by

any other individual. While each probate court judge throughout the state employs a staff that might assist an applicant in obtaining a GFL application or in understanding the eligibility requirements for a GFL license to issue, under applicable Georgia law only the probate court judge has the power to actually issue the license.

Plaintiffs assert that they had every reason to rely on eligibility requirements contained on the Fulton County Probate Court website but inexplicably ignore the plain language of O.C.G.A. § 16-11-129, a state statute clearly giving the probate court judge alone the power to issue GFLs. The filing of an application with Judge Toomer in accord with the applicable statutes, amounts to such an inquiry and would have required action by Judge Toomer. Instead, Plaintiffs presented nothing that required any action by Judge Toomer or that could have resulted in the issuance of a GFL to Plaintiff Goyke under any conceivable circumstance. Without such an application, a GFL could not be issued.

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

In order to establish the requirements of standing under Art. III, § 2 of the U.S. Constitution, 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).

Plaintiffs assert that they have met the first requirement of standing, establishing that they have suffered an injury in fact, based on their alleged denial of the opportunity to apply for and to receive a GFL, a denial they further allege was in violation of several constitutional rights. Plaintiffs assert that the denial of a license that implicates such constitutional rights is in itself a sufficient injury to establish standing, but again cite to cases that are from outside this circuit and that have never been adopted or addressed by any Court in the Eleventh Circuit. 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). Even if this case law were applicable within

the Eleventh Circuit, there was no denial of a license in this case as no application was ever filed.

Plaintiffs go on to assert that Goyke has suffered an actual injury in that he has been deprived of the 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 GFL. Even assuming, arguendo, that such a deprivation amounts to an injury in fact, Plaintiffs have not established a causal connection between the injury and the conduct complained of as Judge Toomer took no action in this matter. While the issuance of a GFL might theoretically serve to alleviate any deprivation allegedly suffered by Goyke, it is important to again note that Goyke never actually applied for a GFL or even requested a GFL application from any member of Judge Toomer's staff. The alleged deprivation 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 restrictions 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.

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

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, there is no need to address the second and third prongs of the test for organizational standing.

## II. PLAINTIFFS' AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED

### A. 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' Amended Complaint alleges simply that self-defense of citizens is basic to the livelihood of the nation (Amended Compl. ¶ 32) and goes on to list various activities from which Goyke is presently excluded, 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). However, as stated above, Goyke would be prohibited from engaging in each of the listed activities 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. Judge Toomer took no action in this matter. 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.

**B. The Amended Complaint Fails to Establish a Violation of Plaintiffs' Rights Under the Privileges and Immunities Clause of the U.S. Constitution Maintainable by 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). 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 on its own behalf. As to Plaintiffs' assertion that GCO is bringing claims for violations of the privileges and immunities clause on behalf of its members, GCO's lack of organizational standing as outlined in Sections I.D and I.E above are fatal to this assertion.

**C. 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 United States 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.

Even assuming that Plaintiffs are correct in their assertion that recent case law, including *District of Columbia*

*v. Heller*, 554 U.S. ___, No. 07-290, Decided June 26, 2008), imply that the Second Amendment now applies to the individual states, Plaintiffs have still failed to establish that Judge Toomer took any action at all related to Plaintiffs. Plaintiff Goyke's own failure to ever file a GFL application is the action that leaves him in the position he is in today. Without such a filing, Judge Toomer was never required to act and never did so.

**D. The Amended Complaint Fails to Establish a Violation of Plaintiffs' Rights Under the Due Process 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). However, as is the case for each of the constitutional violations alleged in their Amended Complaint, Plaintiffs have neither alleged nor directed this Court's attention to any factual basis for their due process claims. Indeed, while the Amended Complaint asserts that Judge 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. Again, without an application for a GFL being filed with Judge Toomer or another probate court judge within the

state of Georgia, the only persons authorized by O.C.G.A. § 16-11-129 to issue a GFL, it is impossible for a GFL to have issued. As such, until such an application is filed, Plaintiffs' current position would remain exactly the same under any conceivable circumstances. As such, Plaintiffs assertions as to violations of the due process provisions of the Fourteenth Amendment to the United States Constitution by Judge Toomer must be dismissed.

**III. CONCLUSION**

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

Respectfully submitted, this 11th day of September, 2008.

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**CERTIFICATE OF FONT TYPE, SIZE AND SERVICE**

THIS IS TO CERTIFY that on the 11th day of September, 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 **Reply to Plaintiffs' Response in Opposition to Defendant's Second Motion to Dismiss** 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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