IN THE UNITED STATES DISTRICT COURT
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**
Defendants.	)	

ORDER

The above-captioned case came before the Court on March 6, 2009, for a hearing on Defendant's Motion to Dismiss Plaintiffs' Amended Complaint [Doc. No. 12] and Plaintiffs' Motion to Certify Class [Doc. No. 6]. For the reasons outlined below, the Court **GRANTS** Defendant's Motion to Dismiss and **DENIES** Plaintiffs' Motion to Certify Class **as moot**.

FACTUAL BACKGROUND

Plaintiff GeorgiaCarry.Org, Inc. (hereinafter "GCO") is a non-profit corporation organized under the laws of the State of Georgia. Plaintiff Regis Goyke (hereinafter "Mr. Goyke") is a citizen and resident of the State of Wisconsin, a citizen of the United States and a member of GCO. Mr. 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. Judge Pinkie Toomer serves as the Fulton County, Georgia, Probate Judge. James Brock (hereinafter "Mr. Brock"), a non-party, serves as the Clerk of the Probate Court of Fulton County.

On June 19, 2008, John Monroe, counsel for GCO and Mr. Goyke, wrote Judge Toomer's office asking if Mr. Goyke would be permitted to apply for a Georgia firearms license (hereinafter "GFL") pursuant to O.C.G.A. § 16-11-129. Plaintiffs allege that Mr. Brock responded in writing that Mr. Goyke would not be allowed to apply for a GFL because he is not a resident of the State of Georgia. There is no allegation in the Amended Complaint 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.

Plaintiffs allege that blank GFL applications are not readily available to the general public and are "closely guarded." However, there is no allegation in the Amended Complaint that Mr. Goyke or his counsel requested such an application from Judge Toomer at any time relevant to this matter. Plaintiffs further allege that Mr. Brock, as Clerk of the Fulton County Probate Court, is the gatekeeper of GFL applications, and that Judge Toomer has effectively delegated

her responsibility as to GFL applications to Mr. Brock. However, there is no allegation that any Plaintiff in this case has ever been denied a GFL when such actually was requested.

Plaintiffs allege Mr. Brock's assertion that Mr. 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 United States Constitution, the Militia Clause of the United States Constitution, the Second Amendment to the United States Constitution, and the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

Finally, Plaintiffs assert that the current action is authorized as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure. Plaintiffs request that this Court certify a class composed of every probate judge in the State of Georgia and allege that Judge Toomer is an adequate representative of this proposed class of defendants.

STANDARD OF REVIEW

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) provides for dismissal of an action if the court lacks subject matter jurisdiction. A Rule 12(b)(1) motion facially attacking the existence of subject matter jurisdiction requires the court to determine whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction.

Lawrence v. Dunbar, 919 F.2d 1512, 1529 (11th Cir. 1990). "On a facial attack, a plaintiff is afforded safeguards similar to those provided in opposing a Rule 12(b)(6) motion-the court must consider the allegations of the complaint to be true." *Id.* (citations omitted). Because ripeness and standing 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).

DISCUSSION

Having considered Defendant Pinkie Toomer's Motion to Dismiss Plaintiffs' Amended Complaint, all briefs filed by the parties in connection therewith, the oral arguments made by counsel, and the applicable law, the Court concludes that Defendant Pinkie Toomer's Motion to Dismiss Plaintiffs' Amended Complaint for lack of subject matter jurisdiction is due to be granted.

Article III of the United States Constitution limits the power of the federal courts to hear actual "cases" and "controversies" U.S. Const. Art. III, § 2. Accordingly, 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 v. Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1223 (11th Cir. 2004).

To demonstrate standing to bring a lawsuit, a party seeking to invoke federal jurisdiction must demonstrate: (1) an injury in fact or an invasion of a legally protected interest; (2) a direct causal relationship between the injury and the challenged action; and (3) a likelihood of redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *see also Pittman v. Cole*, 267 F.3d 1269, 1282-85 (11th Cir. 2001). Again, in evaluating whether a party has standing, we must "accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." Warth v. Seldin, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

"The ripeness doctrine protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes." *Digital Props. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997). The ripeness inquiry requires a determination of (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration. *Id.* In considering fitness and hardship, courts must consider whether delayed review would cause hardship to the plaintiff, whether judicial

intervention would inappropriately interfere with further administration action, and whether courts would benefit from further factual development of issues presented. *Alabama Power Co. v. Federal Energy Regulatory Comm'n*, 685 F.2d 1311, 1315 (11th Cir. 1982); *accord Chevron U.S.A. v. Traillour Oil Co.*, 987 F.2d 1138, 1153 (5th Cir. 1993).

Here, the Court finds that Plaintiffs have failed to present a ripe controversy because, according to the facts alleged in the Amended Complaint, neither Mr. Goyke nor any member of GCO has actually requested an application for a GFL, applied for a GFL, or received a final determination on such an application. While Plaintiffs allege that Judge Toomer has largely delegated the authority to receive and process GFL applications, to make decisions regarding issuance and denial of GFLs and even to sign GFLs, O.C.G.A. § 16-11-129 is clear that it is the probate court judge who has the sole authority to issue GFLs. There has been no showing by Plaintiffs that Judge Toomer has taken any action as to this matter herself. Moreover, the opinion allegedly given by Mr. Brock that Mr. Goyke would not be able to apply for a GFL was nothing more than a hypothetical opinion, as neither Mr. Goyke nor any other member of GCO, at the time that this action was commenced, actually requested or submitted an application.

Plaintiffs allege that their counsel served Defendant with the summons and complaint and that he spoke personally with Judge Toomer at that time. Just as easily as Plaintiffs' counsel spoke with Judge Toomer then, Plaintiffs could and should have made efforts prior to commencing this litigation to address Judge Toomer directly, in writing or in person, regarding Mr. Goyke's alleged inability to apply for and to receive a GFL. Plaintiffs did not do so, and they have not shown that delayed consideration of this matter to permit them the opportunity to do so at this point would cause them undue hardship. For this reason and those mentioned above, Plaintiffs have not presented a ripe controversy as to their claim based on their alleged inability to apply for a GFL. *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).

Further, although Plaintiffs complain in this case about their inability to obtain an application for a GFL, Fulton County is only one county in the State of Georgia, and there has been no showing that either Mr. Goyke or another member of GCO ever attempted to apply for a GFL in any other county in an effort to receive a final determination and then to have a ripe controversy to present to the Court. Notably, the heart of the challenge in this action is to the constitutionality of O.C.G.A.

§ 16-11-129(a), the Georgia statute requiring individuals to be domiciled in a county in the State of Georgia in order to be eligible to obtain a GFL. Plaintiffs could and should have taken additional steps to make their challenge to this statute ripe.

The Court has considered Plaintiffs' argument that applying for a GFL would be a futile act, in any event. However, without a final determination on a GFL application by Judge Toomer or any other probate court judge, this Court has no way of knowing whether Mr. Goyke or any other member of GCO would be denied a GFL for reasons in addition to domiciliary status. As such, Plaintiffs have not established and cannot establish a substantial likelihood that the primary injuries they allege in this action - not being able to obtain a GFL - would be redressed by a favorable decision, a requirement for Plaintiffs to have standing. *See KH Outdoor, L.L.C. v. Clay County, Fla.*, 482 F.3d 1299, 1303 (11th Cir. 2007) (holding, in context of billboard construction case, that redressibility requirement is not met if plaintiff is not entitled to the ultimate relief sought for other reasons that are not the subject of the constitutional challenge in the litigation). Plaintiffs' allegation that Mr. Goyke otherwise meets all the eligibility requirements for obtaining a GFL is insufficient, even if true,

as a probate judge's decision to issue a GFL is a matter of discretion. *See* O.C.G.A. § 16-11-129 ("The judge of the probate court of each county *may*, on application under oath and on payment of a fee of $15.00, issue a license….") (emphasis added); *see also Propst v. McCurry*, 252 Ga. 56, 310 S.E.2d 914 (1984) ("OCGA § 16-11-129 … grants to probate courts the discretion to grant or deny applications for licenses to carry handguns.").

In sum, while the Court agrees that the Eleventh Circuit's decision in *Digital Props. v. City of Plantation*, 121 F.3d 586 (11th Cir. 1997), the primary case relied on by Defendants, is factually distinguishable in several respects, the Court still finds in this case that Plaintiffs did not pursue their claims with requisite diligence to show that a mature claim or controversy exists for which they have standing to bring. As such, subject matter jurisdiction is lacking, and the case must be dismissed.

CONCLUSION

For the foregoing reasons, the Court hereby **GRANTS** Defendant Pinkie Toomer's Motion to Dismiss Plaintiffs' Amended Complaint [Doc. No. 12] for lack of subject matter jurisdiction. As the dismissal of Plaintiffs' Complaint effectively brings an end to the current litigation, Plaintiffs' Motion to Certify

Class [Doc. No. 6] is **DENIED as moot.**

SO ORDERED, this 13th day of March, 2009.

Clarence Cooper
United States District Judge