

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

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

RESPONSE IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS

Introduction

Plaintiffs challenge the constitutionality of a state law prohibiting otherwise eligible non-residents of Georgia from applying for and obtaining a Georgia firearms license (“GFL”). Defendant moved to dismiss¹, claiming Plaintiffs should have attempted to apply for a 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

¹ After Defendant filed her Motion to Dismiss, Plaintiffs filed an Amended Complaint, which technically mooted Defendant’s Motion to Dismiss. *ACLU of Florida, Inc. v. Miami-Dade County School Board*, 439 F.Supp.2d 1242, 1260 (S.D. Fla. 2006). Plaintiffs asked Defendant to withdraw her Motion or stipulate to its mootness in light of Plaintiffs’ Amended Complaint, but she refused to do so. Plaintiffs are therefore forced to respond to Defendant’s arguments in case the Court decides to entertain

attempt would not be permitted. In other words, the application would have been utterly futile. 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.²

Defendant also argues that the Complaint fails to allege any Constitutional violations, including the Privileges and Immunities Clause, the Militia Clause, and the Second Amendment. Defendant goes so far as to argue that Plaintiffs' (Amended) Complaint should be dismissed because the Second Amendment's "right to keep and bear arms" is no right at all, as in her view it protects no right of the people against infringement by the State of Georgia, instead merely protecting citizens against infringement by Congress. As will be seen below, these rights are fully enforceable against the State of Georgia and are well plead in the Amended Complaint. 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.

them despite their mootness.

² Plaintiffs observe that Defendant purports to have filed her Motion "without submitting to the jurisdiction of Court." Doc. 7-1, p. 1. In fact, Defendant has submitted to the jurisdiction of this Court by filing a Rule 12(b) motion and failing to raise a defense of lack of personal jurisdiction. *See*, Fed. R. Civ. Proc. 12(h)(1)(A).

Argument

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

1. Plaintiffs' Claims are Ripe

Forcing Plaintiffs 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 DC 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 radio 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. The absolute ban on nonresidents would have rendered any attempt at license application an utterly futile act, which federal law does not require a Plaintiff to do to establish standing or ripeness. *See Id.*

2. Defendant’s Main Case Is Distinguished by Its Facts

The cases cited by Defendant are inapposite to Plaintiffs’ factual situation in this case. 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 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.

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. 7-2, p. 9. 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.³ *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.*

³ 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.

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 the 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. The statute is irrelevant because the state can not enact a statute to make itself immune from a § 1983 case. Otherwise, every state would just declare itself immune from § 1983 actions in federal court.

Moreover, Defendant 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.

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 *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). Defendant incorrectly asserts that Plaintiff Goyke does not have standing because he suffered no injury and, if he did, Defendant did not cause it.⁴ 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. 7-2, p. 12. This lawsuit is not, however, a pre-enforcement challenge to a criminal law. Defendant inexplicably ignores the Counts actually listed in the

⁴ Defendant apparently concedes the third prong of standing – redressability.

Complaint [Doc. 1]⁵. In the Complaint, Plaintiffs' list their injuries as Count 1) Violation of their rights under the Privileges and Immunities Clause of the Constitution; Count 2) Violation of their rights under the Militia Clause of the Constitution; Count 3) Violation of their rights under the Second Amendment to the Constitution; and Count 4) Violation of the Due Process Clause of the Fourteenth Amendment to the Constitution. None of the Counts in the 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 a sufficient injury for the purposes of standing. *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*, for example, O.C.G.A. § 16-11-126, making it a

⁵ Although Plaintiffs have filed an Amended Complaint, the Counts of the Amended

crime to carry a concealed weapon but exempting holders of GFLs; O.C.G.A. 16-11-127, permitting licensees to carry in state parks, restaurants that serve alcohol, and mass transit (the last exception is to a felony with a penalty of 20 years imprisonment and a \$15,000 fine, *see* Code section 16-12-123), O.C.G.A. 16-11-127.1, making it a felony punishable by ten years imprisonment to carry a handgun in a “gun free school zone” without a license, O.C.G.A. § 16-11-128, making it a crime to carry a handgun without a license, but exempting holders of GFLs; 18 U.S.C. § 922(q), making it a federal crime to carry a firearm in a “school zone” but providing a blanket exception for people traveling through a school zone if they have a license to carry a firearm issued by the state in which the school zone is located, in other words, by Georgia and no other state). 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 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 Toomer caused the injury alleged (the denial of the right to apply for and receive a GFL). Defendant apparently feels obligated to

Complaint are identical to the Counts in the original Complaint.

follow the state law regarding GFL applications (even if the law is unconstitutional), and Defendant's policy 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 GCO has Standing

An organization such as 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 (and in their original 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, without citing any support for her position, that Plaintiffs’ right of self-defense is not “sufficiently basic to the livelihood of the nation.” She 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.

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 64.⁶

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,

⁶ Dick Heller, the Plaintiff in that 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 and temporarily living.

Plaintiffs are prohibited from carrying a pistol, without a GFL, outside of “his or her” 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], implying that carrying in another’s home 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,

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. *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 Privileges and Immunities 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.⁷

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) (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) (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

⁷ “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, and thereby implicating 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

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

citizens may sue under the Privileges and Immunities Clause, so GCO has organizational standing on behalf of its members. *See* Part A3 above.

3. Plaintiffs' Militia Clause Rights Have Been Violated

Defendant asserts without citation to any authority that she has not violated Plaintiffs' rights under the Militia Clause. She also claims incorrectly that Plaintiffs have not alleged any facts to support their Militia Clause claim.

Plaintiff Goyke alleged in the Complaint (and now Amended Complaint) that he is an able-bodied male citizen between the ages of 17 and 45. Amended Complaint, ¶¶ 60-61. The Militia Clause of the Constitution empowers Congress to call forth, organize, arm, and discipline the militia. U.S. Const. Article I, § 8. The militia is composed of "all males physically capable of acting in concert for the common defense." *Heller*, Slip Opinion at 22, citing *United States v. Miller*, 307 U.S. 174, 179 (1939). Congress further divided the militia into the "organized" militia and the "unorganized" militia, by establishing the organized militia as all able-bodied male citizens between ages 17 and 45 that are National Guard and Naval Militia members and the unorganized militia as such able-bodied male citizens that are not members of those units. 10 U.S.C. § 311. Clearly, Plaintiffs have established that Goyke is a

member of the militia. Moreover, Plaintiffs specifically alleged that Goyke is a member of the militia. Amended Complaint, ¶ 68.

As a member of the militia, Goyke is subject to being called up by Congress to act in concert for the common defense. He is “the natural defence of a free country.” *Heller* Slip Opinion at 24 (citation omitted). A member of the militia must have access to arms, as “history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people’s arms....” *Id.* at 25.

“In all the colonies, as in England, the militia system was based on the principle of the assize of arms. This implied the general obligation of all adult male inhabitants to possess arms....” *U.S. v. Miller*, 59 S.Ct. 816, 818 (1939) (citations omitted). The Militia Clause was inserted into the Constitution as a furtherance of the Second Amendment’s guarantee of an individual right to keep and bear arms. *Silveira v. Lockyer*, 328 F.3d 567, 585 (9th Cir 2003) (Kleinfeld, C.J., *dissenting*). *See also Presser v. Illinois*, 116 U.S. 252 (1886) (“It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, . . . the states cannot, even laying the constitutional provision (i.e., the Second Amendment) in question out of view,

prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security . . .”). If Defendant can deny Plaintiffs the right to carry firearms anywhere in Georgia, then Defendants can deprive Plaintiffs of their right and duty to be effective members of the militia.

4. The Second Amendment Applies to Georgia, and Plaintiffs’ Second Amendment Rights Have Been Violated

Defendants seek to have Plaintiffs’ Second Amendment claims dismissed on the ground that the Second Amendment does not apply to the states. In other words, Defendant contends that this second provision of the Bill of Rights restrains Congress, but that Georgia and Defendant may violate it with utter impunity. This argument could be recast accurately as, “The Second Amendment to the United States Constitution contains no rights that the State of Georgia is bound to respect.”

In support of this proposition, Defendants cite a list of pre-*Heller* cases from the First, Fourth, Sixth, Seventh and Ninth Circuits that came to the same conclusion.⁸

⁸ Somewhat surprisingly, Defendants fail 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

There are no modern cases of non-incorporation of the Second Amendment that do not cite or rely on *Presser* or *Cruikshank*. Both predate the 20th Century application of the incorporation doctrine to the bulk of the Bill of Rights. *See*, for example *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)).

In *Benton*, the court said that fundamental rights guaranteed by the Bill of Rights apply equally to the states and the federal government. 395 U.S. at 795. “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 the State of Georgia admits that the Second Amendment is binding upon it. 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,*

no state action. *See Heller*, footnote 23.

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*.

5. Plaintiffs Have a Valid Due Process Claim

Defendants mistakenly argue that Plaintiffs have no valid *equal protection* claim under the Fourteenth Amendment, but Plaintiffs have not asserted such a claim. Count 4 of the Amendment Complaint (and the original 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.

Plaintiffs' Privileges and Immunities Clause claim already has been discussed, so Plaintiff will briefly touch on its Due Process Clause claim (which Defendant does not attack and which therefore is not actually a subject of Defendant's 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.

CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing Response in Opposition to Defendant's Motion to Dismiss on July 29, 2008 using the CM/ECF system which automatically will send email notification of such filing on the following:

Steven Rosenberg
Office of the County Attorney
141 Pryor Street, SW, Suite 4038
Atlanta, GA 30303
404-612-0246
404-730-6324 (fax)
steven.rosenberg@fultoncountyga.gov

 /s/ John R. Monroe
John R. Monroe