IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC.,	)	
TAI TOSON,	)	
EDWARD WARREN,	)	
JEFFREY HUONG,	)	
JOHN LYNCH,	)	
MICHAEL NYDEN, and	)	
JAMES CHRENCIK	)	
Plaintiffs,	)	
	)	Civil Action No. 2007 CV 138552
v.	)	
	)	
FULTON COUNTY, GEORGIA,	)	
CITY OF ATLANTA, GEORGIA,	)	
CITY OF EAST POINT, GEORGIA,	)	
CITY OF MILTON, GEORGIA,	)	
CITY OF ROSWELL, GEORGIA,	)	
CITY OF SANDY SPRINGS, GEORGIA	)	
and	)	
CITY OF UNION CITY, GEORGIA,	)	
Defendants	)	

PLAINTIFFS' RESPONSE TO ROSWELL'S MOTION TO DISMISS

Introduction

Roswell admits that it has, or had, an ordinance banning the carrying of firearms in Roswell's Parks. Roswell admits that, with the Court of Appeals' decision in *GeorgiaCarry.Org, Inc. v. Coweta County*, ruling that state law preempts local governments from regulating the carry of firearms, "the question was settled." Inexplicably and despite its claims to the contrary, however, Roswell continues to attempt to regulate the carrying of firearms in violation of state law. Roswell's legal analysis defies logic and cannot be sustained.

Argument

Roswell Claims this Case is Moot Because Plaintiff Won a Similar Case

In a completely illogical conclusion, Roswell claims that Plaintiffs' claims "are moot as a result of the Court of Appeals decision issued December 4, 2007." Roswell's Brief, p. 1. Roswell is referring to *GeorgiaCarry.Org, Inc. v. Coweta County*, 288 Ga. App. 748, 655, S.E.2d 346 (2007). In *Coweta County*, one of the instant Plaintiffs, GeorgiaCarry.Org, Inc. ("GCO"), filed a substantially identical suit against Coweta County. In reversing the superior court's grant of the County's motion for summary judgment, the Court of Appeals said:

> In construing [O.C.G.A. § 16-11-173], we are mindful of the "golden rule" of statutory construction, which requires that we follow the literal language of the statute unless doing so "produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else." And the plain language of the statute expressly precludes a county from regulating "in any manner [the] … carrying … of firearms." Under these circumstances, the preemption is express, and the trial court erred in concluding otherwise.

288 Ga. App. 748. Thus, it is clear that neither Roswell's, nor any other Defendants', ordinance can stand. It is inconceivable that Roswell somehow concludes that GCO's win at the Court of Appeals of a case directly on point moots Plaintiffs' claims. Of course, quite the opposite is true.

Roswell's Attempted Ordinance Modification is Preempted and *Ultra Vires*

Not willing to accept the fact that it cannot regulate the carrying of firearms, Roswell has begun the process (according to its Amended Answer) of modifying its ordinance from prohibiting carrying firearms in parks to prohibiting carrying firearms to public gatherings. Roswell's Amended Answer, Exh. A, p. 1. Roswell's proposed new ordinance proclaims, "it is unlawful to carry a firearm to a public gathering within the City." *Id.*

Roswell cannot be permitted to play a "where you cannot carry a firearm" shell game by repealing one ordinance only to create a new illegal one. This is the epitome of attempting to

modify prohibited conduct for the purpose of depriving the court of jurisdiction (as opposed to an earnest desire to obey the law).

Because Roswell's Motion is premised almost entirely on its claim that the case is moot, the entire Motion fails. The claim for attorney's fees is likewise very much alive, because Plaintiffs gave Roswell an *ante litem* notice for fees and Roswell continues to litigate the matter more than 30 days later.

Plaintiffs Do Allege Injury Under Federal Law

Roswell briefly argues that Plaintiffs' claims under 42 U.S.C. § 1983 allege only a potential injury. Nothing could be further from the truth. Plaintiffs' Amended Complaint clearly alleges that Plaintiffs' possess valid firearms licenses, that they have property interests in those licenses, and that Roswell's ordinance interferes with and diminishes the value of, those licenses. Amended Complaint, ¶¶ 4-7. Plaintiffs are not claiming only a potential injury, as Roswell suggests. Plaintiffs are claiming an actual, concrete, particularized injury flowing directly from Roswell's illegal prohibition against carrying firearms. This is a cognizable claim under 42 U.S.C. § 1983.

Roswell is Estopped from Arguing Second Amendment Does Not Apply

There is ample historical information indicating the intent and common understanding that the Fourteenth Amendment applied the Second Amendment to the states. Roswell cites a 2006 case in which the Supreme Court of Georgia determined that the Second Amendment does not apply to the states. The State of Georgia, however, has recently (earlier this month) filed a brief with the Supreme Court of the United States conceding that the Second Amendment is properly incorporated by the Fourteenth Amendment and properly applied to the states:

> Although the Court need not reach the issue of incorporation in this case, *amici* States submit that the right to keep and bear arms is fundamental and so is

> properly subject to incorporation. To be sure, early decisions of this Court cast doubt on Second Amendment incorporation, *see United States v. Cruikshank*, 92 U.S. 542, 553 (1875); *Presser v. Illinois*, 116 U.S. 252, 264-65 (1886), ***but those opinions predated the Court's broad-based incorporation of the Bill of Rights against he States.*** *See Duncan v. Louisiana*, 391 U.S. 145, 148 (1968). In the judgment of the *amici* States, the right to keep and bear arms is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (citations and internal quotation marks omitted) *overruled on other grounds, Benton v. Maryland*, 395 U.S. 784 (1969). Authors of the Fourteenth Amendment concurred. *See* Van Alstyne, *supra* note 4, at 1252 (noting that in reporting the Fourteenth Amendment to the Senate, Senator Howard of Michigan described the right to keep and bear arms as among the Constitution's "great fundamental guarantees." (internal quotation marks omitted)).

Brief of 31 States as *Amici Curiae* in *District of Columbia v. Heller*, No. 07-290, filed February 11, 2008, p. 23, FN 6 [Emphasis supplied]. As noted by the *Amici* (including the State of Georgia), the cases cited by Roswell and upon which the Supreme Court of Georgia relied, predate the widespread incorporation of the Bill of Rights against the states. Moreover, with the State of Georgia admitting that the Second Amendment applies to it, Roswell is estopped from asserting otherwise. O.C.G.A. § 24-4.24; *McDonald v. Hester*, 115 Ga. App. 740, 741 (1967). Because Roswell is a creature of the State, it is bound by the admissions of the State. Finally, the decision in the *Heller* case by the Supreme Court of the United States is expected by June, and no doubt will be of assistance to this Court in assessing Plaintiffs' Second Amendment claims.

Conclusion

This case is not moot because Plaintiffs won a similar case in the Court of Appeals. Quite the contrary, it is clearer than ever that Roswell has no viable defense. Plaintiffs have properly pleaded valid federal claims. Roswell's Motion to Dismiss must be denied.

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